(2) Supreme Court, U.S.
FILED

No. 01 606 APR 2 0 2001

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL CHANDLER, invididually and as father and next friend of JESSE CHANDLER,

Petitioners,

v.

DON SIEGELMAN, in his official capacity as Governor of the State of Alabama and as President of the State Board of Education, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Volume I – Appendices A-D

PAMELA L. SUMNERS
(Counsel of Record)
ACLU of Illinois
180 N. Michigan Avenue
Suite 2300
Chicago, Illinois 60601
(312) 201-9740

ELIZABETH J. HUBERTZ
Robinson, Curley
& Clayton, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

[Additional Counsel Listed Inside Front Cover]

Washington, D.C. • THIEL PRESS • (202) 328-3288

177 P

STEVEN K. GREEN
Americans United for
Separation of
Church and State
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

STEPHEN L. PEVAR
ACLU Foundation
32 Grand Street
Hartford, Connecticut 06106

– Counsel for Petitioners –

TABLE OF CONTENTS

(Entire Table of Contents appears in both volumes)

Volume I:

A. Panel Decision in *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. October 19, 2000) A1

B. Panel Decision in *Chandler v. James*, 180 F.3d 1254 (11th Cir. July 13, 1999) B1

C. Order vacating *Chandler v. James* and remanding, *Chandler v. Siegelman*, — U.S. —, 120 S. Ct. 2714 (June 30, 2000.) C1

D. District Court's Order on Motion for Partial Stay of Permanent Injunction, *Chandler v. James*, 998 F. Supp. 1255 (M..D. Ala. December 17, 1997) D1

Volume II:

E. District Court's Memorandum Opinion and Order regarding section 16-1-20.3 of the Alabama Code, *Chandler v. James*, 958 F. Supp. 1550 (M.D. Ala. March 12, 1997) E1

F. District Court's Permanent Injunction, *Chandler v. James*, 985 F. Supp. 1062 (M.D. Ala. October 29, 1997) F1

G. District Court's Supplemental Opinion and Order, *Chandler v. James*, 985 F. Supp. 1068 (M..D. Ala. November 12, 1997) G1

H. District Court's Memorandum Opinion and Order, *Chandler v. James*, 985 F. Supp. 1094 (M.D. Ala. November 12, 1997) H1

I. Eleventh Circuit Order, denying rehearing *en banc* (April 13, 2001) I1

J. Constitutional and Statutory Provisions J1

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 97-6898, 97-6953

D. C. Docket No. 96-CV-169-N

MICHAEL CHANDLER, individually and as
next friend of his son, Jesse Chandler,
et al.,

Plaintiffs-Appellees,

versus

DON SIEGELMAN, in his official capacity
as Governor of the State of Alabama and
President of the State Board of Education,
et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Alabama

(October 19, 2000)

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Before TJOFLAT, GODBOLD and HILL, Circuit Judges.
HILL, Circuit Judge:

In 1999, we unanimously vacated the Permanent Injunction entered by the district court in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999)(Chandler I). We also denied plaintiffs-appellees' petition for rehearing. No judge requested a vote on a rehearing en banc, and the mandate issued. Plaintiffs then filed a petition for certiorari with the Supreme Court.

On June 19, 2000, the Supreme Court issued its decision in *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000). On June 26, 2000, the Supreme Court granted the petition for certiorari in *Chandler I* ,[1]vacated our judgment, and remanded the case to us for further consideration in light of *Santa Fe*. The case was returned to us on September 1, 2000.

We have completed our review of *Chandler I* and have concluded that it is not in conflict with the Supreme Court's decision in *Santa Fe*. Accordingly, we will reinstate our opinion and judgment in *Chandler I* . We take this opportunity, however, to explain how *Chandler I* fits within the Supreme Court's analysis in *Santa Fe* so that the district court may have this guidance when it revisits its

---

[1] Pursuant to Rule 43(c)(2), Fed. R. Ap p. P., Governor Don Siegelman was automatically substituted as a party for his predecessor in office, former Governor Fob James. The case is now styled *Chandler v. Siegelman*.

injunction.

I.

Santa Fe condemns school *sponsorship* of student prayer. *Chandler* condemns school *censorship* of student prayer. In their view of the proper relationship between school and prayer, the cases are complementary rather than inconsistent.[2]

In *Santa Fe*, the Supreme Court reaffirmed that the Establishment Clause of the First Amendment prohibits a school district from taking affirmative steps to create a vehicle for prayer to be delivered at a school function. 120 S. Ct. at 2279. This principle has been established for more than thirty years. *Engel v. Vitale*, 370 U.S. 421 (1962). The Court applied that principle to hold that Santa Fe's policy of allowing students to vote on whether to have prayer before football games constitutes such an affirmative step. *Id.* at 2277.

Several facts were critical to this holding. First, the school board adopted the following policy:

> The board has chosen to permit a student to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event . . .

Id. at 2273. Second, the school board instituted its policy by establishing a two-step election process. First, students

---

[2] Furthermore, *Santa Fe* is limited to the issue of school-sponsored student speakers over public address systems at official school events. The activities prohibited by the Permanent Injunction entered in *Chandler I* are far more extensive.

vote on whether to have an invocation or message prior to football games. If so, a second election is held to choose a student to do so. *Id.* Only that student may speak at the game, and the same student delivers the message at each game. Id.

In view of these facts, the Court rejected *Santa Fe's* argument that it was merely providing a neutral accommodation of private religious speech. *Id.* at 2277. The Court found significant that the school policy "approve[s] of only one specific kind of message, an `invocation.'" *Id.* Under these circumstances, the Court concluded that "the District has failed to divorce itself from the religious content in the invocations," and has crossed the line from state *neutrality* toward religion to state *sponsorship* of religion.

The fatal flaw in the Santa Fe policy was its attempt to disentangle itself from the religious messages by instituting the student election process. Santa Fe thought it could satisfy the constitutional requirement for neutrality toward religious speech by allowing such speech to be chosen by the majority. In the Court's view, however:

> Santa Fe's student election system ensures that only those messages deemed `appropriate' under the District's policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

Id. at 2276. Such a policy, the Court concluded, substitutes the views of the majority for the government neutrality

required by the Establishment Clause. Thus, it violates the very raison d'être of the Establishment Clause – protection against the tyranny of a religious majority. *Id.* at 2277.

Consequently, the policy is not a *neutral* accommodation of religion. On the contrary, "the realities of the situation plainly reveal that [the District's] policy involves both perceived and actual *endorsement* of religion." *Id.* at 2277. The "`degree of school involvement' makes it clear that the pre-game prayers bear `the imprint of the State.'" *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577 (1992)).

Because the prayers bear the imprint of the State, they cannot be characterized as "private" speech protected by the Free Exercise and Free Speech Clauses. The Court held:

> The delivery of such a message – over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer -*is not properly characterized as "private" speech.*

Id. at 227 (emphasis added). Since the religious speech produced by Santa Fe's policy is sponsored by and, therefore, attributable to the school, it constitutes an unconstitutional endorsement of religion by the State.

II.

Although the policy at issue in *Santa Fe* involved student-led invocations on school property at school-sponsored, school- related events, the Court was careful to point out that "*not every message delivered under such*

circumstances is the government's own." *Id.* Thus, *Santa Fe* does not obliterate the distinction between State speech and private speech in the school context. It does not reject the possibility that some religious speech may be truly private even though it occurs in the schoolhouse. Nor does it hold that all religious speech is inherently coercive at a school event. On the contrary, the prayer condemned there was coercive precisely because it was *not* private. 120 S.Ct. at 2277. The Court's holding in *Santa Fe* is only that State-sponsored, coercive prayer is forbidden by the Constitution.

Furthermore, *Santa Fe* explicitly reaffirms the basic principle that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 120 S.Ct. at 2275 (quoting *Board of Ed. v. Mergens,* 496 U.S. 226, 250 (1990)).[3] *Santa Fe* leaves unanswered, however, under what circumstances religious speech in schools can be considered *private*, and, therefore, protected. This is the answer *Chandler I* sought to supply.

In *Chandler I,* we were asked to review an injunction which assumed that virtually any religious speech in schools is attributable to the State. While the district court recognized that a student must be allowed to pray *silently* while in school, or even discuss his religious

---

[3] As we said in *Chandler I*, "[r]eligious speech by students does not become forbidden `state action' the moment the students walk through the schoolhouse door." 180 F.3d 1261-62.

beliefs *quietly* with others, it enjoined the school district from *permitting* any prayer in a *public* context at any school function.[4] We held that this injunction was overbroad to the extent that it equated all student religious speech in any public context at school with State speech. In so doing, it eliminated any possibility of *private* student religious speech under any circumstances other than silently or behind closed doors. This the Constitution neither requires nor permits. The Establishment Clause does not require the elimination of private speech endorsing religion in public places. The Free Exercise Clause does not permit the State to confine religious speech to whispe rs or banish it to broom closets. If it did, the exercise of one's religion would not be free at all.

It is not the public context that makes some speech the State's. It is the entanglement with the State. What the Court condemned in *Santa Fe* was not private speech endorsing religion, but the delivery of a school-sponsored prayer. Remove the school sponsorship, and the prayer is private. In *Chandler I*, we held that such prayer must be permitted.

Therefore, if "[n]othing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the school day," *Santa Fe,* 120 S.Ct.at 2281, then it does not prohibit prayer aloud or in front of others, as in the case of an audience

---

[4] For example, the Permanent Injunction permits students to "quietly engage in religious activity during non-instructional times, so long as it does not unduly call attention thereto." *Chandler I*, 180 F.3d at 1260 n [sic].

assembled for some other purpose. *Chandler I*, 180 F.3d at 2279. So long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected:

> Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's - either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Id. As we said in *Chandler I*, a policy which *tolerates* religion does not improperly *endorse* it. 180 F.3d 1261.

Private speech endorsing religion is constitutionally protected - even in school. Such speech is not the school's speech even though it may occur in the school. Such speech is not unconstitutionally coercive even though it may occur before non- believer students. The injunction entered by the district court in this case proceeded on a contrary assumption and we reaffirm our directive that it must conform its requirements to the Constitution. We directed the district court to revisit its injunction in order to ensure that it did not command the school district to actively prohibit - censor - genuinely student- initiated religious speech, and we do so again.

III.

The Permanent Injunction enjoins the school district from "aiding, abetting, commanding, counseling, inducing,

ordering, or procuring" school organized or officially sanctioned religious activity. The school district recognizes that it may not do these things and does not appeal this portion of the injunction. The injunction also forbids the school district from "permitting" students to speak religiously in any sort of public context. This it cannot constitutionally do. The Permanent Injunction may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech.[5]

Accordingly, we reaffirm our opinion and reinstate our judgment in *Chandler I*. The case is REMANDED to the district court for further proceedings not inconsistent with this opinion.

---

[5] The district court had before it a great deal of information concerning prior actions of school personnel indicating a majoritarian purpose to foster one particular religion. Indeed, it was because of this record that we affirmed the appointment of a monitor. *See Chandler I*, 180 F.3d at 1265. We had no occasion, then or now, to inspect any specific activity of students *permitted* to speak religiously. Nor shall we speculate. Should the permission we now hold to be required be transformed into proselytizing by school personnel, the monitor can bring it to the attention of the court.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 97-6898, 97-6953

D. C. Docket No. 96-CV-169-N

MICHAEL CHANDLER, individually and as next friend of his son, Jesse Chandler, *et al.*,

Plaintiffs-Appellees,

versus

FOB JAMES, JR., in his official capacity as Governor of the State of Alabama and President of the State Board of Education, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Alabama

(July 13, 1999)

Before TJOFLAT, Circuit Judge, and GODBOLD and HILL, Senior Circuit Judges.

HILL, Senior Circuit Judge:

Plaintiffs brought this action challenging the facial constitutionality of Alabama's statute permitting non-sectarian, non-proselytizing student-initiated prayer, invocations and benedictions during compulsory or non-compulsory school-related assemblies, sporting events, graduation ceremonies and other school-related events. Plaintiffs also challenged the statute as applied by the DeKalb County School Board. The district court held the statute unconstitutional on its face, granted plaintiffs partial summary judgment on their claims regarding the statute as applied, and enjoined defendants from enforcing the statute or continuing to conduct the challenged practices. Defendants bring this appeal.

I.

In 1993, the Alabama Legislature enacted a statute containing the following provision:

> (b) On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

Ala. Code § 16-1-20.3(b) (1995).

In 1996, Michael Chandler, a vice-principal in the DeKalb County school system, and his son Jesse, a student in that system, brought this action challenging the facial validity and the application of this statute in the DeKalb County schools.[1] Defendants included the Governor of the State of Alabama, the State Superintendent of Education, the members of the State Board of Education, and the Superintendents and members of the boards of education of the City of Talladega and of DeKalb County, Alabama.[2]

On March 12, 1997, the district court granted partial summary judgment for the Chandlers, holding the statute facially unconstitutional. On October 29, 1997, the district court permanently enjoined DeKalb County from enforcing the statute. On November 12, 1997, the district court issued findings of fact and conclusions of law in its Supplemental Opinion and Order. That same day, but by separate Memorandum Opinion and Order, the district court held that DeKalb had engaged in unconstitutional officially organized or sponsored religious activities, and granted summary judgment to the Chandlers on their claim that DeKalb had applied the statute unconstitutionally. The district court appointed a monitor to oversee the enforcement of the Permanent Injunction. All defendants

---

[1] Also named as plaintiffs are Jane Doe and her daughter Deborah Doe.

[2] The Chandlers subsequently entered into a partial consent decree with the City of Talladega and the district court dismissed the Talladega defendants from the case in 1996.

appealed from the Permanent Injunction, the Supplemental Opinion and Order, and the Memorandum Opinion and Order.

In his brief, the Governor of the State of Alabama asserts that the district court erred in holding the statute facially unconstitutional under the First Amendment. The Governor contends that the First Amendment's prohibition against the establishment of a religion does not apply to the states by virtue of the Fourteenth Amendment. The district court rejected this argument, as do we. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). *See also Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947). Because the states are bound by the First Amendment, the district court did not err in evaluating Alabama's statute under it. Accordingly, we shall affirm the judgment of the district court as to the Governor's appeal.[3]

The remainder of the appellants (referred to collectively as DeKalb) do not contest the district court's holding that the statute is facially unconstitutional, nor that the DeKalb County schools engaged in unconstitutional officially organized or sponsored religious activities. Therefore, we do not review the district court's determinations of these issues.

Neither does DeKalb appeal that portion of the Permanent Injunction entered by the district court which prohibits it from "aiding, abetting, commanding, counseling, inducing, ordering, or procuring . . . school

---

[3] The Governor does not assert any other error by the district court. We do not decide whether the district court erred in holding the statute facially unconstitutional for any reason not presented to us.

organized or officially sanctioned religious activity in its schools including, but not limited to, vocal prayer, Bible and devotional or scriptural readings, distribution of religious materials, texts, or announcements, and discussions of a devotional or inspirational nature, in school or at school-related events, to include assemblies, sporting events, and graduation ceremonies." Apparently, DeKalb concedes that, under Supreme Court precedent, it may not prescribe prayer or allow state employees to lead, participate in or otherwise endorse prayer of any type during curricular or extracurricular events.[4] *See Lee v. Weisman*, 505 U.S. 577, 586 (1992); *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

The Permanent Injunction, however, also prohibits DeKalb from "permitting" vocal prayer or other devotional speech in its schools. While the injunction makes clear that it does not prohibit students from voluntarily praying while at school or at school-related events, either individually or with each other, so long as the prayer is purely *private*,[5] it prohibits all prayer or other devotional speech in situations which are not purely private, such as aloud in the classroom, over the public

---

[4] We do not, therefore, reach any of these issues.

[5] The Permanent Injunction recites that nothing in it should be read to "affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. § 4071 *et seq.*, or to quietly engage in religious activity during noninstructional times." Permanent Injunction at 4.

address system, or as part of the program at school-related assemblies and sporting events, or at a graduation ceremony. Furthermore, the prohibition applies to bar not only school personnel from leading or participating in such public or vocal prayer or other devotional speech or Bible reading, but also *requires school officials to forbid students* [6] *or other private individuals from doing so while in school or at school-related events.*

DeKalb does appeal this portion of the Permanent Injunction. It contends that the district court may not constitutionally require it to forbid this speech, pointing out that the Supreme Court has made very clear that "[p]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capital Square Review Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).[7] "There is a crucial difference between

---

[6] We shall refer to all non-government, private parties collectively as "students."

[7] The Departments of Justice and Education issued a statement of principles in the summer of 1995 "to provide school officials with guidance [concerning] the extent to which religious expression and activities are permitted in public schools." The first paragraph of the statement advises:

> Student prayer and religious discussion: The Establishment clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example,

government speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987)) (emphasis in original).

Even the Chandlers agree that "[t]he Establishment Clause does not ban prayer. It bans *state* prayer." (Plaintiffs' Reply Brief) (emphasis in original). They contend, however, that student-initiated religious speech in the public schools *is* state prayer, and, therefore, DeKalb may not permit it.

Our review of the Permanent Injunction, then, is limited to the issue of whether the district court may constitutionally enjoin DeKalb from permitting student-initiated religious speech in its schools.[8] For the following reasons, we hold the court may not. We vacate the

---

> students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable non-disruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

News Release of U.S. Dep't of Educ., Aug. 17, 1995, at 3.

[8] DeKalb also appeals the district court's decision to appoint a monitor to enforce its injunction which we discuss below.

Permanent Injunction and remand for further proceedings.

II.

The district court's opinion holds that the Constitution requires it to prohibit public religious speech in schools because the Establishment Clause is violated if government permits religious speech – even if initiated by students – in schools or at school-related events. DeKalb contends that this conclusion is wrong for two reasons. First, students are not state actors and, therefore, by definition, their actions cannot tend to "establish" religion in violation of the Establishment Clause. Second, the Free Speech and Free Exercise Clauses of the First Amendment require the State to *tolerate* genuinely student-initiated religious speech in schools.

Students as State Actors and the Establishment Clause

The Establishment Clause prohibits Congress – or any other governmental body – from acting in such a way as to establish a religion. *Everson*, 330 U.S. at 8. DeKalb argues that because students are not state actors – Congress or a governmental body – their religious speech cannot, by definition, tend to establish a religion.

It is true that ordinarily religious speech by private parties cannot establish religion, even if it occurs in a public institution, such as a school. *Mergens*, 496 U.S. at 250. On the other hand, it is clear that private parties' religious speech can violate the Establishment Clause if the State uses such parties as surrogates to accomplish what the State may not do. For example, if a school board may not constitutionally write and require students to recite a prayer, as it most assuredly may not, *Engel v. Vitale*, 370 U.S. 421 (1962), the school board may not avoid this

prohibition by delegating this function to others. *Lee*, 505 U.S. at 577 (invalidating school board policy permitting clergy to give prayers at graduation); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981) (invalidating school board guidelines which required student or teacher-led prayers in classrooms). Nor may the State establish a policy which "permits" private parties to speak, but then limits their speech to prayer or other devotional speech. *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 277 (5th Cir. 1996) (authorizing *invocations, benedictions and prayers*); *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (school board policy permitted students to vote to have *prayer* at graduation); *Harris v. Joint Sch. Dist.*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1155 (1995) (school policy permitted student to lead *prayer*); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (authorizing student-led *invocations* and *only* invocations at school sporting events); *Hall v. Board of Sch. Comm'rs*, 656 F.2d 999 (5th Cir. 1981) (school policy permitted *devotionals*, and only devotionals); *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 760-61 (9th Cir. 1981) (authorizing *invocations, benedictions*, and *prayers* only).

When the State *commands* religious speech, it steps over the Constitution to establish religion. In each of these cases, it is the *State's decision to create an exclusively religious medium* which violates the Establishment Clause; *not* the private parties' religious speech. It is not the "permitting" of religious speech which dooms these policies, but rather the *requirement* that the speech be religious, i.e., invocations, benedictions, or prayers.

This was the holding of the original school prayer case, *Engel v. Vitale*, in which the Court observed:

> The Petitioners contend among other things that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country *it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.*

370 U.S. at 425 (emphasis supplied). The Court held, therefore, that "government in this country, be it state or federal, is without power to *prescribe by law any particular form of prayer which is to be used as an official prayer* in carrying on any program of governmentally sponsored religious activity." *Id.* (emphasis supplied). This is all it held.

Some lower courts have extended *Engel* to require

government to prohibit *any* public expression of religious belief in schools. Support for this holding is said to be located in the Court's observation that the denominational neutrality of the prayer did not "free it from the limitations of the Establishment Clause." *Id.* at 430. These courts interpreted this to mean that *no* religious speech could be tolerated in the public schools because the Establishment Clause forbade it.

This is not what the Court said, however. The denominational neutrality of the Regent's prayer could not "free it from the limitations of the Establishment Clause" because the prayer was "commanded" by the State. It really did not matter what the prayer said; *no* prayer commanded by the State can survive scrutiny under the Establishment Clause.

The Court specifically cautioned that "nothing could be more wrong" than to interpret *Engel* to require "a hostility toward religion *or toward prayer.*" *Id.* at 434 (emphasis supplied). On the contrary, "[t]he history of man is inseparable from the history of religion." The First Amendment, "which tried to put an end to governmental control of religion and of prayer, was not written to destroy either." *Id.* at 435. Rather, it protects freedom of religious expression by forbidding *government* from requiring us to "speak only the religious thoughts that government want[s] [us] to speak and to pray only to the God that government want[s] [us] to pray to." *Id.* The Court summarized its holding in *Engel* in the following way:

> It is neither sacrilegious nor antireligious to say that each separate *government in this country should stay out of the business of*

> *writing or sanctioning official prayers* and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

Id. (emphasis supplied). Thus, *Engel* merely made clear that the Establishment Clause prohibits the government from commanding prayer and prescribing its form.[9]

But DeKalb does not claim otherwise. DeKalb contends only that nothing in the First Amendment, nor in any of the Supreme Court's interpretations of it, requires it to prohibit the religious speech of private parties – such as students – if that speech is genuinely privately-initiated, i.e., not commanded by a school board or state law. On the contrary, DeKalb argues, the First Amendment positively *requires* that it tolerate students' religious speech to the same extent that it permits students' secular speech.

The Chandlers, on the other hand, contend that when the State permits students to speak religiously in situations that are not purely private,[10] the State lends its imprimatur to the speech, thereby endorsing and advancing religion in violation of the "obligation of the public schools to provide a religiously neutral environment." They also argue that all public religious speech in schools is

---

[9] The opt-out provision of the school board's policy was constitutionally insignificant in the context of "governmentally composed prayers for religious services" in schools. 370 U.S. at 425.

[10] The Permanent Injunction, for example, permits students to "quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto."

unconstitutionally coercive of some students because of "peer pressure." Consequently, schools must forbid all public religious speech in school, including genuinely student-initiated religious speech.

Student Speech and the Free Exercise and Free Speech Clauses

This, then, is the question DeKalb asks us to answer. Do school officials have "the ability (and duty) to impose content restrictions on purportedly 'private' speakers at school events," in order to achieve neutrality with respect to religion as the Chandlers contend (Chandlers' Brief at 27); or do the Free Exercise and Free Speech Clauses require that school officials permit student religious speech at the same time, and in the same place and manner as secular speech, as DeKalb contends? Under the Chandlers' theory, student religious speech is attributable to the State thereby violating the constitutional requirement of neutrality. Students, therefore, cannot be permitted to speak freely in school if religion is the topic; the State has a positive duty to censor student speech if it is religious.

We disagree. The suppression of student-initiated religious speech is neither necessary to, nor does it achieve, constitutional neutrality towards religion. For that reason, the Constitution does not permit its suppression.

It is true that government must be neutral with respect to religion. But it is equally true, as Justice Goldberg warned, that an:

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that

> noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

School Dist. of Abington Township v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J. concurring).

The discriminatory suppression of student-initiated religious speech demonstrates not neutrality but hostility toward religion because the:

> exclusion of religious ideas, symbols, and voices marginalizes religion . . . . Silence about a subject conveys a powerful message. When the public sphere is open to ideas and symbols representing nonreligious viewpoints, culture, and ideological commitment, to exclude all those whose basis is "religious" would profoundly distort public culture.

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 189 (Winter 1992).

The prohibition of all religious speech in our public schools implies, therefore, an unconstitutional *disapproval* of religion. If endorsement is unconstitutional because it "sends a message to nonadherents that they are outsiders," disapproval is unconstitutional because it "sends the opposite message." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). "What is crucial is that a government practice

not have the effect of communicating a message of government endorsement *or* disapproval of religion." *Id.* at 692 (emphasis supplied). "Cleansing" our public schools of all religious expression, however, inevitably results in the "establishment" of disbelief – atheism – as the State's religion. Since the Constitution requires neutrality, it cannot be the case that government may prefer disbelief over religion.[11]

Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's – either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Because genuinely student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution. *See Mergens*, 496 U.S. at 250; *Jones v.*

---

[11] We believe that the First Amendment's requirement that government "tolerate" diverse political views, including those that are totally antithetical to our constitutionally guaranteed republican form of government, applies to require that government "tolerate" atheistic views without also requiring that we eschew religion. Tolerance of disbelief does not require that we deny our religious heritage, nor elevate atheism over that heritage. The First Amendment requires only that the State tolerate both, while establishing neither. Americans, however, are free to prefer one or the other and to express that preference wherever they are permitted to speak. This means, of course, that a student may choose to express his atheistic views as well as his religious ones.

Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992). "Students do not shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Religious speech by students does not become forbidden "state action" the moment the students walk through the schoolhouse door.

Furthermore, the Supreme Court has made clear that permitting religious speech or symbols in our public institutions does not automatically constitute an unconstitutional State endorsement of religion. In fact,"[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1983). References to our religious heritage are found in the statutorily prescribed national motto on our currency, "In God We Trust," 36 U.S.C. § 186, and in the language "one nation under God," which is part of the Pledge of Allegiance to our flag – recited by public school children every day. Congress opens with a prayer, and, indeed, the Supreme Court, itself, hears oral argument in a chamber decorated with a depiction of Moses and the Ten Commandments. We celebrate Thanksgiving and Christmas as national holidays, and Congress has directed the President to proclaim a National Day of Prayer each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 169h.

The Constitution does not require a complete separation of church and state such that religious

expression may not be tolerated in our public institutions.[12] In fact, "it affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S. at 673 (emphasis supplied). The Supreme Court has made clear that "[a]nything less would require the 'callous indifference' we have said was never intended by the Establishment Clause," and "would bring us into 'war with our national traditions as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Id.* (quoting *McCollum v. Board of Education*, 333 U.S. 203, 211-12 (1948)).

The examples cited above all "evidence [our] accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation . . . governmental action has 'follow[ed] the best of our traditions' and 'respect[ed] the religious nature of our people.'" *Lynch*, 465 U.S. at 677-78 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). Genuinely

---

[12] In fact, the Constitution probably does not require a "wall" at all. The phrase comes from a letter written by Jefferson who was neither present when the First Amendment was passed, nor consulted about its language. In a short note to the Danbury Baptist Association written fourteen years after the Bill of Rights was passed, he made a passing reference to idea that the First Amendment "build[s] a wall of separation between church and State." *See Wallace v. Jaffree*, 472 U.S. 38, 92 (Rehnquist, J., dissenting). In any event, the "wall" concept has been acknowledged by the Court itself, with what Justice Rehnquist characterized as "embarrassing candor," as merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived." *Id.* at 107 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

student-initiated religious speech can also be accommodated without resulting in an unconstitutional State endorsement of religion.

Furthermore, even if permitting student-initiated religious speech advances religion in some sense, this does not mean the speech violates the Establishment Clause. Even *State* action may incidentally advance religion without offending the Constitution. *Widmar v. Vincent*, 254 U.S. 263 (1981). The Supreme Court has recognized that "our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch*, 465 U.S. at 683. "Not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Id.* (quoting *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)). Student-initiated religious speech, therefore, even if it incidentally advances religion, does not violate the Establishment Clause because it is private speech endorsing religion which the First Amendment protects. *See Clear Creek*, 977 F.2d at 965.

Finally, the fact that student religious speech may fall on deaf ears does not make it unconstitutionally coercive. *Lee*, 505 U.S. at 577. In *Lee*, the Supreme Court was careful to point out that:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We

> know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity.

505 U.S. at 597.[13] Those who do not espouse a speaker's religious beliefs are free not to listen, and to express their disagreement by not participating in any way.

Accommodation of religious beliefs we do not share is, however, a part of everyday life in this country:

> In so acting, we express respect for, but not endorsement of, the fundamental values of others. We act without expressing a position on the theological merit of those values or of religious belief in general, and no one perceives us to have taken such a position.

Lee, 505 U.S. at 628 (Souter, J. concurring). Respect for the rights of others to express their beliefs, both political and religious, is the price the Constitution extracts for our own liberty.[14] This is a price we freely pay. It is not

---

[13] Of course, in this case we do not have state action. Private religious speech has even less potential for coercion.

[14] Justice Scalia observed in *Lee* that "We indeed live in a vulgar age. But surely 'our social conventions,' have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. . . . I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate – so that even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter's interest in avoiding even the false appearance of participation constitutionally trumps the government's interest in

coerced.[15] Only when the speech is commanded by the State does it unconstitutionally coerce the listener.[16]

Ultimately, the issue in this case is not whether school officials may prescribe prayer or enlist surrogates to that end. They may not. Nor is the issue whether school officials may prohibit religious speech in schools, or censor the content of that speech. They may not. The real issue is what sort of time, place, and manner limits may be imposed upon genuinely student-initiated religious speech in schools? When may students pray? Where may they pray? Under what circumstances may they pray?

In answering these questions, we must fulfill the constitutional requirement of *permitting* students freely to express their religious beliefs without allowing the machinery of government – the school – to be used to

---

fostering respect for religion generally." 505 U.S. at 637-38 (Scalia, J. dissenting).

[15] Justice Souter acknowledged this in *Lee*: "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State. But that is not our case." 505 U.S. at 630 n. 8.

[16] The "indirect coercion" identified in *Lee* by the plurality opinion was exerted over the audience by the *State*'s command that there be religious speech at graduation. 505 U.S. at 592-93. Justice Kennedy's concern that "*in the hands of government* what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce," *id.* at 591-92 (emphasis supplied), does not apply to the case of student-initiated religious speech.

command prayer. This requires that we resolve the tension between the right to pray and the right to be free from government-mandated prayer. This is not an easy task. It would be easy simply to banish prayer from our public institutions, but this would be not only constitutionally incorrect, but also fundamentally unfair to our society.

III.

How, then, does a school accommodate religious expression without commanding it? DeKalb argues that the answer is simple – it is to be "permitted." Not required. Not commanded. Not even suggested. Simply, permitted. If students, or other private parties, wish to speak religiously while in school or at school-related events, they may exercise their First Amendment right to do so.

The first principle must always be that genuinely student-initiated religious speech must be *permitted.* A student's individual decision to pray or otherwise speak religiously is not the State's command. *Clear Creek*, 977 F. 2d at 965.[17] Such speech is fully protected. *Id. See also Mergens*, 496 U.S. at 252.

On the other hand, even genuinely student-initiated religious speech may constitute state action if the State

---

[17] The Ninth Circuit also upheld a policy that permitted the top four students to speak on any topic of their choosing without state approval in *Doe v. Madison Sch. Dist.*, 147 F.3d 832 (9th Cir. 1998), but the court en banc ordered the district court to dismiss the complaint for lack of standing and mootness. No. 97-35642 (9th Cir. May 19, 1999).

participates in or supervises the speech. *See Duncanville*, 70 F.3d at 406-07.[18] Religious speech in school by teachers, for example, is especially troublesome because "a teacher's [religious] speech can be taken as directly and deliberately representative of the school." *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991). Teacher participation in student-initiated prayer "improperly entangles the State in religion and signals an unconstitutional endorsement of religion." *Duncanville*, 70 F.3d at 406. In upholding the Equal Access Act, which provides that schools must afford religious groups the same access to school facilities as secular groups enjoy, the Supreme Court relied in part on the act's express

---

[18] While many subsequent courts have cited *Duncanville* for the proposition that student-initiated speech at school-related sporting events is *un*constitutional, the Fifth Circuit specifically held that, "[s]tudents *may voluntarily pray together*, provided such prayer is not done with school participation or supervision." 70 F.3d at 405 (emphasis supplied). Judge Jones, in her separate concurrence and dissent, pointed out that:

> This decision . . . does not prevent students from exercising their constitutional rights of free speech, association and free exercise by praying at appropriate times and in an appropriate manner during athletic practices or games. Further, we must abide by the Supreme Court's decisions . . . that prevent active school leadership, encouragement or promotion of the prayers. The only questions here are how teachers may respond to student-initiated prayers and to what extent the school may "supervise" the prayers.

70 F.3d at 409.

prohibition on teacher participation which "avoids the problems of the 'students' emulation of teachers as role models.'" *Mergens*, 496 U.S. at 251 (quoting *Edwards*, 482 U.S. at 584). Therefore, student religious speech must be without oversight, without supervision,[19] subject only to the same reasonable time, place, and manner restrictions as all other student speech in school.

Because religious speech is protected speech, government may not censor its content. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (quoting *Cornelius v. NAACP Legal Defense &*

---

[19] What constitutes "supervision?" As Judge Jones wrote in *Duncanville*:

> At a broad level, everything that goes on during practice or competition, including student-initiated locker-room or basketball court prayer, is subject to the coaches' "supervision." To outlaw supervision on this level would be to outlaw the otherwise constitutional student-led prayers. . . . It must be, then, that the injunction pertains only to active supervision and is thus redundant of the cautions that the school may not promote, encourage or lead prayers.

70 F.3d 410.

Supervision cannot mean, therefore, mere presence. Support for this view is found in *Mergens* in which the Supreme Court found no constitutional infirmity with the provision of the EAA which permits school employees to be present for custodial purposes at religious meetings held on school property. 496 U.S. at 236. We agree with Judge Jones that, for supervision to amount to unconstitutional endorsement, it must cross the line into active endorsement, encouragement or participation.

Educ. Fund, Inc., 473 U.S. 788, 806 (1985)) (the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses). Suppression of religious speech constitutes viewpoint discrimination, the most egregious form of content-based censorship. *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995). Government may not, therefore, censor religion from the content of students' protected speech at school. *Cornelius*, 473 U.S. at 806 ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are *viewpoint neutral*.") (emphasis supplied); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (A "state may reserve the [nonpublic] forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.")

A student's right to speak religiously is not, however, without limit. The school may impose the same reasonable restrictions on the time, place, and manner of religious speech as it does on secular student speech. Furthermore, a student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience. *See Abington*, 374 U.S. at 228. The Constitution requires that schools permit religious expression, not religious proselytizing. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the

Establishment Clause." *Lee*, 505 U.S. at 587. Proselytizing speech is inherently coercive and, the Constitution prohibits it from the government's pulpit. *Id.*

IV.

The Permanent Injunction enjoins DeKalb from "aiding, abetting, commanding, counseling, inducing, ordering, or procuring" school organized or officially sanctioned religious activity. DeKalb does not appeal this prohibition. The record in this case reveals, however, that there were many sincere, but unconstitutional efforts by school personnel to do just what the injunction prohibits – to endorse, encourage, or participate in student religious activity. For this reason, the appointment of a monitor by the district court was not an abuse of discretion. *See Local 28 of the Sheet Metal Workers' Int'l v. EEOC,* 478 U.S. 421, 481-82 (1986). The monitor's task is to be vigilant in guarding against the repetition of this unconstitutional activity by the schools.

The Permanent Injunction also forbids DeKalb from "permitting" students to speak religiously. This it cannot constitutionally do. So long as school personnel do not participate in or actively supervise student-initiated speech, DeKalb cannot constitutionally prohibit students from speaking religiously and the Permanent Injunction cannot require it to.

We do not undertake to re-write the Permanent Injunction. The district court is in the best position to do that. We note only that the Permanent Injunction may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and

manner of that speech which exceed those placed on students' secular speech.[20]

Accordingly, the Judgment of the district court is AFFIRMED as to the Governor's appeal. As to the remaining defendants' appeals, the Permanent Injunction is VACATED and the case is REMANDED for further proceedings not inconsistent with this opinion.

---

[20] This includes restrictions on announcements permitted in the schools' commencement programs, and the distribution of religious literature.

TJOFLAT, Circuit Judge, specially concurring:

I agree wholeheartedly with the majority's analysis in this case. I write separately, however, to emphasize a more fundamental error made by the district court. I believe that many provisions of the injunction entered by the district court were entered in violation of basic principles of equity jurisprudence and constitutional law – namely, the principle that equity will not intervene where there is an adequate remedy at law and the constitutional principle of separation of powers. These principles, for reasons that will be explained hereafter, lead to the conclusion that a court should not enter an injunction that cannot be enforced through coercive contempt sanctions. Some of the injunctive provisions at issue here cannot be so enforced, and therefore must be vacated.[1]

In part I of this concurrence, after recognizing that injunctions are enforced through contempt sanctions, I discuss the types of contempt sanctions generally available to a judge. I then explain that the types of contempt sanctions available to address a violation of a particular injunction depend on the nature of the injunction; not all types of sanctions are available for all injunctions. Finally, I explain why, based on equitable and constitutional considerations, an injunction should be entered as a form

---

[1] The issues I discuss herein were properly not relied upon by the majority opinion for the simple reason that they were not raised by the appellants either in the district court or on appeal. They are, however, sufficiently important to our system of jurisprudence that I feel it is appropriate – indeed necessary – to address them sua sponte in this concurrence.

of relief for a party to a lawsuit only when one type of contempt sanction – coercive – is potentially available for violations. Part II then applies this rule to the facts of this case.

I.

Injunctions are enforced through contempt sanctions. See 18 U.S.C. § 401(3) (1994). When it comes to a judge's attention that an individual may not be in compliance with an injunction he has entered, he holds a "show cause" hearing at which the allegedly noncomplying individual is asked to show cause why he is disobeying the injunction. If the individual is in fact disobeying the injunction, and he is unable to provide an acceptable excuse for doing so, then he is subject to the contempt powers of the court.[2] In this part, I discuss the types of contempt sanctions available to a court, and then discuss how this should impact the court's decision whether to grant injunctive relief in the first instance.

A.

Contempt sanctions take one of three forms: punitive, compensatory, or coercive. Punitive sanctions punish the contemnor for his conduct, and are imposed for the purpose of vindicating the authority of the court. See Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441,

---

[2] This procedure is laid out in more detail in Wyatt v. Rogers, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996).

31 S. Ct. 492, 498, 55 L. Ed. 797 (1911).[3] For instance, if an individual is served with a subpoena duces tecum but refuses to produce the requested documents, and the court subsequently holds him in contempt and imposes a flat fine of $50 (payable to the court) for his contempt, the contempt sanction is properly classified as punitive. See Penfield Co. of Cal. v. SEC, 330 U.S. 585, 592-93, 67 S. Ct. 918, 922, 91 L. Ed. 1117 (1947). In such a situation, the opposing party is provided no relief, because it gets neither the requested documents nor the proceeds from the fine. Furthermore, the contemnor has no way to purge the contempt (in other words, avoid the fine); if he produced the requested documents five minutes after the court's decision, he would still be required to pay $50. The sanction in such a case is intended to punish the contemnor for his contempt, thereby vindicating the court's authority and thus deterring the contemnor and others from violating subsequent judicial orders (issued by the same or any other court). Punitive sanctions are criminal in nature and therefore many of the constitutional protections available in criminal proceedings – including the presumption of innocence, the privilege against self-incrimination, the right to counsel, and the right to a jury trial in serious cases – must be provided to the alleged contemnor before such sanctions can be imposed. See Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798-99,107 S. Ct.

---

[3] The principles set forth in Gompers have been recently reaffirmed in International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 826-29, 114 S .Ct. 2552, 2556-58, 129 L. Ed. 2d 642 (1994).

2124, 2133, 95 L. Ed. 2d 740 (1987).[4]

The second form of contempt sanction is compensatory. Compensatory sanctions are civil in nature and compensate the plaintiff for the damage caused by the contemnor's contempt. See United States v. United Mine Workers of Am., 330 U.S. 258, 303-04, 67 S. Ct. 677, 701, 91 L. Ed. 884 (1947). The contempt sanction in the well-known case of Jones v. Clinton, 36 F. Supp. 2d 1118 (E.D. Ark. 1999), falls into this category. In that case, the court, having found that the defendant gave false deposition testimony, held the defendant in contempt. The punishment for the contempt was a payment to the plaintiff of the expenses (including attorney's fees) caused by the false testimony. See id. at 1134-35. Compensatory sanctions, unlike punitive sanctions, provide a direct benefit to the plaintiff. Like punitive sanctions, however, the contemnor is unable to purge his contempt: Were President Clinton now to amend his deposition answers to make them completely accurate, the contempt sanctions would nevertheless remain in force.

---

[4] As stated in Young:

> [D]efendants in criminal contempt proceedings must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves; must be advised of charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses; must be given a public trial before an unbiased judge; and must be afforded a jury trial for serious contempts.

Young, 481 U.S. at 798-99, 107 S .Ct. at 2133 (citations omitted).

The third form of contempt sanction is coercive. Coercive sanctions are also civil in nature, and are intended to coerce the contemnor into doing an act that he is already required to do, but refuses to perform. See Gompers, 221 U.S. at 441-42, 31 S. Ct. at 498. Thus, to use the previously cited example from Penfield, if the district court had ordered the recipient of the subpoena duces tecum to pay a fine of $50 per day for every day the recipient failed to produce the requested documents, such a sanction would be coercive.[5] Coercive sanctions benefit the plaintiff by pressuring the defendant into performing an action that the plaintiff desires to have performed. See id. at 442, 31 S. Ct. at 498. They also give the contemnor the opportunity to purge his contempt: The punishment continues only as long as the contemnor refuses to comply with the relevant court order. Hence, in regard to coercive sanctions, it is often said that a contemnor carries the key to his prison in his own pocket. See, e.g., Blalock v. United States, 844 F.2d 1546, 1559 (11th Cir. 1988) (Tjoflat, J., specially concurring) (quoting In re Nevitt, 117 F. 448, 461 (8th Cir. 1902)).

The lines separating each type of sanction from the others are not always clear. Consider a situation in which a court imposes a $150 contempt sanction on a party, payable to the adverse party but in no way correlated to the

---

[5] The fine would presumably be paid to the court, although in theory it could be paid to the opposing party. Regardless of who received the money, because the clear purpose of the fine would be to pressure the contemnor into compliance, the fine would be classified as coercive.

harm suffered by that party. The fact that the sanction is payable to the adverse party (and not the court) makes the sanction appear compensatory, but the fact that the amount of the sanction is unrelated to the harm suffered by the adverse party leads to the conclusion that the sanction is in fact punitive. Cf. Thyssen, Inc. v. S/S Chuen On, 693 F.2d 1171, 1173-74 (5th Cir. 1982). Furthermore, every contempt sanction serves to some degree to vindicate the authority of the court (and thus is somewhat punitive) and to dissuade the contemnor from repeating his misbehavior (and thus is somewhat coercive). See Gompers, 221 U.S. at 443, 31 S. Ct. at 498. One might argue that this fact renders meaningless the distinctions among the types of contempt sanctions – for instance, because all contempt sanctions are somewhat punitive, it makes no sense to distinguish punitive contempt sanctions from the other two types of contempt sanctions. This, however, is the equivalent of arguing that because all men have facial hair, it makes no sense to distinguish between bearded and non-bearded men. In both cases, the question is one of degree, and the fact that there will be difficult cases at the margins does not deprive the conceptual categories of their significance. Instead, difficult cases merely require a detailed "examination of the character of" the sanction being imposed in order to determine whether it is punitive, compensatory, or coercive. Hicks v. Feiock, 485 U.S. 624, 636, 108 S. Ct. 1423, 1432, 99 L. Ed. 2d 721 (1988).

B.

The types of sanctions – punitive, compensatory, or coercive – that can be used to enforce an injunction depend

on the character of the conduct being enjoined. Consider first an injunction that commands the performance of a specific act. For instance, imagine a case in which the defendant operates a paper mill that is discharging pollutants onto the plaintiff's land. The plaintiff brings a lawsuit alleging a nuisance, and seeks an injunction ordering the defendant to shut down the mill. The plaintiff succeeds and the injunction is granted. The defendant, however, continues to operate the paper mill. The court, after conducting a show cause hearing and finding the defendant in contempt, could use any of the types of sanction previously discussed: a punitive sanction (such as a flat fine of $10,000), a compensatory sanction (such as a fine of $5,000, which is roughly equal to the harm caused, payable to the plaintiff), or a coercive sanction (such as a fine of $100 per day until the paper mill is shut down).

Next, consider an injunction that forbids the performance of a specific act. For instance, imagine a case in which an employee alleges that her corporate employer, through the actions of its CEO (who is also the majority shareholder), has, on a number of occasions, touched her in inappropriate areas. The employee claims that this behavior constitutes sexual harassment, in violation of 42 U.S.C. § 2000e-2(a)(1) (1994).[6] She files a lawsuit against her employer, seeking an injunction ordering the employer

---

[6] The employee's claim would be that the CEO had created an "abusive work environment," as opposed to a claim of quid pro quo sexual harassment. See generally Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (discussing "abusive work environment" claims).

to cease the harassment.[7] She succeeds, and the injunction is granted. Nevertheless, the CEO continues the inappropriate touching. The court, after conducting a show cause hearing and finding the employer in contempt, can assess punitive sanctions (such as a flat fine of $10,000, payable to the court) or compensatory sanctions (such as a fine equal to the harm caused, payable to the employee). Coercive sanctions, however, are not available, because the act to be prevented by the injunction has already occurred – in other words, there is no way to purge the contempt.[8] See Gompers, 221 U.S. at 442, 31 S. Ct. at 498 ("[I]f the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. [Contempt

---

[7] Injunctions of this sort actually amount to nothing more than injunctions to "obey the law," which, for reasons different from those outlined here, have repeatedly been held invalid. See, e.g., Payne v. Travenol Labs., Inc., 565 F.2d 895, 897-98 (5th Cir. 1978) (holding that injunctions to "obey the law" violate the requirements of Fed. R. Civ. P. 65(d) that an injunction "be specific" and "describe in reasonable detail . . . the act or acts sought to be restrained"). (In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.)

[8] The situation might be different depending on the nature of the harassment. For instance, if the harassment consisted in part of the placement of pornographic pictures throughout the office, the employee could seek an injunction ordering that the pictures be removed. If the injunction was granted, it could be enforced through coercive sanctions – for instance, a fine of $200 per day until the pictures were removed.

sanctions] cannot undo or remedy what has been done . . . .").

To make the point clearer, try to imagine a court attempting to enter coercive sanctions in the situation outlined above. The court has enjoined the employer not to harass the employee. The employer nevertheless does so, and, after a show cause hearing, is held in contempt. The court fines the employer $100 per day until . . . well, until what? Presumably, until the court is persuaded that the harassing CEO will not repeat his misbehavior. Thus, after three days of fines, the CEO contacts the judge and promises that he will never again sexually harass the employee. The court thinks the CEO was shifting his eyes a bit much when he made the promise, however, and therefore allows the fines to continue accumulating. After a week of fines, the CEO makes the same promise, but this time on his knees and with his hands clearly visible so that the court can see that the CEO's fingers are not crossed. The court is still unpersuaded, and continues allowing the fines to accrue. This exercise would presumably continue until such time as the court, for whatever reason, decided that the CEO had learned his lesson.[9] Even then, the contempt would not have been purged, because the harassment would already have been fully accomplished. The point is simply that when an injunction forbids the performance of an act, coercive sanctions are not available

---

[9] In contrast, where the contemnor is enjoined to perform a specific act, promises of future compliance are neither necessary nor relevant – the contemnor can avoid sanctions by (and only by) performing the commanded act.

to enforce the injunction.

Note that it is not the affirmative or negative phrasing of the injunction that is critical. An injunction commanding the performance of specific act (for instance, "shut down the paper mill") could, in many cases, just as easily be phrased as an injunction prohibiting a ongoing harm (for instance, "do not operate the paper mill"). Likewise, an injunction forbidding the performance of a specific act (for instance, "do not sexually harass the employee") could, in many cases, be phrased as an injunction commanding the performance of an ongoing duty (for instance, "treat male and female employees equally"). Cf. International Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 835, 114 S. Ct. 2552, 2561, 129 L. Ed. 2d 642 (1994) (suggesting that an injunction directed at a union stating, "Do not strike," is essentially the same as one stating, "Continue working"). Rather, it is the underlying nature of the injunction – specifically, whether it is commanding an act that the law requires or proscribing an act that the law forbids – that determines whether it can be enforced through coercive sanctions.

In sum, if an injunction commands the performance of a specific act (such as shutting down a paper mill), then all three types of sanctions are available to the court. If, however, an injunction forbids the performance of an act (such as sexually harassing an employee), then only punitive and compensatory sanctions are available to the court.

C.

The types of contempt sanctions available for violation of an injunction determine the effectiveness of the injunctive relief being given to the plaintiff. Specifically, as I discuss in this section, injunctions that are enforceable only through punitive and compensatory sanctions provide relief to a plaintiff that is – at best – duplicative of the relief available through an action for damages.[10] Only injunctions enforceable through coercive sanctions provide a form of relief that is unique to equity. They are therefore the only type of injunctions that courts should enter, on the basis of the rule that injunctions should not be granted where the plaintiff has an adequate remedy at law. See Weaver v. Florida Power & Light Co., 172 F.3d 771, 773 (11th Cir. 1999).

Punitive sanctions provide essentially no relief to the plaintiff – as discussed above, the purpose of punitive sanctions is to vindicate the court's authority, not to benefit a party to a lawsuit. Any benefit to the plaintiff from such a sanction is incidental and indirect. For instance, in the sexual harassment hypothetical in part I.B, supra, assume that the court chose to impose a punitive sanction – such as a fine of $10,000 against the employer, payable to the court. This fine would do nothing to affect the harassment that had already occurred; at this point, the harassment is a "done deal" and the court cannot undo it. In addition, the fine would do nothing to compensate the plaintiff for the harm caused by the harassment. The only benefit provided

---

[10] This is not to say that punitive and compensatory sanctions should never be used to enforce injunctions. Some examples of their proper use will be discussed in part I.E, infra.

to the plaintiff from the fine would be a deterrent: Because of the imposition of the fine, the employer might be less inclined to harass the plaintiff in the future. This deterrent, however, is equally available to the plaintiff through an action for damages: If, instead of seeking an injunction and then calling for a show cause hearing at which the employer was assessed punitive sanctions, the plaintiff had simply brought a damages action after the harassment occurred, the employer would be equally deterred. (Furthermore, the plaintiff would receive compensation for the harm caused, unlike in the injunction scenario.) In sum, every benefit that the plaintiff gets from an injunction enforced by punitive sanctions would be equally available in an action for damages.

Compensatory sanctions merely imitate the relief that would be provided in a damages action. For instance, returning to the sexual harassment example, assume that the court chose to impose a compensatory sanction on the employer. The court, after hearing argument from both parties, determined that the damage to the plaintiff from the harassment was roughly $5,000, and ordered the employer to pay that amount to the plaintiff. The fine does not affect the prior harassment (it is again a "done deal"), but compensates the plaintiff for the harm she has suffered. In this situation, the relief provided to the plaintiff imitates that which would be provided in a damages action – in terms of both compensation to the plaintiff and as a future deterrent to the employer. Again, as with punitive sanctions, every benefit that the plaintiff gets from an injunction enforced by compensatory sanctions would be equally available from an action for damages.

Coercive sanctions, in contrast, provide meaningful and unique relief to the plaintiff. For instance, using the paper mill hypothetical from part I.B, supra, assume that the court chose to impose a fine of $100 per day on the defendant until he shut down the paper mill. The defendant is now subject to an ever-increasing pressure to take the action that the plaintiff seeks – a pressure that would not be available through an ordinary damages action. There is of course still no guarantee that the defendant will shut down the mill, but, because of the injunction, the plaintiff is able to exert greater pressure on the defendant to do so than would be possible in the absence of the injunction.

These observations lead to the conclusion that where an injunction is enforceable only through punitive or compensatory contempt sanctions,[11] and not through coercive contempt sanctions, the injunctive remedy being given to the plaintiff is no better than the remedy he could have obtained in an after-the-fact action for damages. Therefore, the plaintiff necessarily has an adequate remedy at law – or at least a remedy at law that is no less adequate than the injunctive remedy.[12] Consequently, the principle

---

[11] As discussed in part I.B, supra, injunctions are enforceable only through punitive or compensatory contempt sanctions when they forbid the performance of an act (or command the performance of an ongoing duty).

[12] An injunction enforceable only through punitive or compensatory sanctions does give a plaintiff one benefit that a damages action cannot provide: an ex ante declaration of the rights of the parties. For instance, consider a case in which the defendant is preparing to

that an injunction will not be entered where the plaintiff has an adequate remedy at law forbids the entering of an injunction under such circumstances.

D.

In addition to violating equitable principles, an injunction that is enforceable only through punitive or compensatory sanctions may also violate the Constitution. Specifically, such an injunction has the potential to run afoul of the constitutional doctrine of separation of powers.

An injunction forbidding the performance of a particular act must be based on a conclusion that the act forbidden, if performed, would constitute a violation of the law. Otherwise, the court would be enjoining the performance of a perfectly legal act, which the court is

---

remove some trees from a plot of land. The plaintiff, asserting that the land is his, seeks an injunction (based on the law of trespass) forbidding the defendant from removing the trees. The plaintiff succeeds and the injunction is issued. The defendant, having previously believed that the land was his, may now be persuaded to change his behavior. Thus, although the injunction would not be enforceable through coercive contempt sanctions (because it forbids the performance of an act), it would nevertheless have provided the plaintiff with meaningful relief in the form of an ex ante declaration of rights. If, however, this is the only form of relief being provided to the plaintiff, then the appropriate remedial vehicle is a declaratory judgment, not an injunction. See 28 U.S.C. § 2201 (1994).

The distinction is not merely a formal one: Injunctions, unlike declaratory judgments, implicate the court's contempt powers and thus subject the enjoined party to sanctions should he disobey. Declaratory judgments therefore do not raise the same separation-of-powers concerns as injunctions, as discussed in part I.D, infra.

without authority to do.

If the law on which the injunction is based is legislatively created, then the legislature is likely also to have created rules regarding the means by which the law should be enforced and the appropriate sanction for a violation of the law. For instance, the harassing behavior of the hypothetical CEO in part I.B, supra, is illegal as a result of Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1994). The procedure for enforcing Title VII is set forth in 42 U.S.C. § 2000e-5 (1994). Under that section, an employee alleging a Title VII violation must first file a charge with the Equal Employment Opportunity Commission ("EEOC"). If the EEOC decides not to bring a civil action against the employer, it must notify the aggrieved employee, who then has ninety days in which to bring a civil action on her own. See 42 U.S.C. § 2000e-5(f)(1). If the action is successful, the types of relief available to the employee are set forth in 42 U.S.C. § 2000e-5(g).[13]

---

[13] Section 2000e-5(g) specifically authorizes injunctive relief for violations of Title VII. This provision could conceivably be read as congressional authorization of injunctive relief regardless of whether the plaintiff has an adequate remedy at law. The more reasonable reading of the provision is that it means merely that injunctive relief is allowed when the traditional equitable requirements are met – including the absence of an adequate remedy at law. See Sanchez v. Philip Morris Inc., 774 F. Supp. 626, 630-31 (W.D. Okla. 1991) (denying an injunction in a Title VII case on the ground that the plaintiff's legal remedies are adequate); cf. Hecht Co. v. Bowles, 321 U.S. 321, 329-30, 64 S. Ct. 587, 591-92, 88 L. Ed. 754 (1944) (holding, in regard to a similar provision in the Emergency Price

Once the employee obtains an injunction that orders the employer to cease the harassment, however, she can completely circumvent the procedure prescribed by Congress. No notice to the EEOC is necessary; the employee need only request a show cause hearing from the court. If the employer is held in contempt, the court can respond with compensatory or punitive sanctions. See supra part I.B. If the court imposes compensatory sanctions, the limitations on relief found in 42 U.S.C. § 2000e-5(g) will be inapplicable. Furthermore, the employer will have no means of raising many of the defenses that would be available in an ordinary civil action, such as laches. If the court imposes punitive sanctions, it will have effectively made criminal conduct that Congress has not deemed criminal (in light of the absence of statutory criminal punishments for violations of Title VII). Even if Congress had done so, the enforcement of the criminal law would be a matter for the executive branch, not the judicial branch.[14] Thus, regardless of whether the injunction is enforced through compensatory or punitive sanctions, the court has intruded on the

---

Control Act, that the traditional rules of equity still apply to the granting of injunctions). Even if I am mistaken in this view, however, this means merely that Title VII is an exception to the general rule (much like securities law, see infra note 18) and takes nothing away from the broader point being made in the text.

[14] This is one of the reasons for the equitable principle that equity will not enjoin the commission of a crime. See 11A Charles Alan Wright et al., Federal Practice and Procedure § 2942, at 70-71 (2d ed. 1995).

province of the legislative and executive branches by altering the congressionally-created procedures and remedies for sexual harassment.[15]

In sum, an injunction enforceable only through punitive or compensatory sanctions constitutes an individualized criminal or civil law (respectively). This new law is duplicative of the existing law but with a different enforcement mechanism – contempt proceedings – and thus creates an opportunity to use different procedures and to impose different sanctions from those contemplated by the legislature under the circumstances. Therefore, where the action being enjoined is a violation of statutory law, the entry of an injunction implicates the constitutional doctrine of separation of powers. See Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 n.9, 110 S. Ct. 2510, 2517 n.9, 110 L. Ed. 2d 455 (1990) (noting that separation of powers requires "that Congress rather than the courts controls the availability of remedies for violations of statutes"); cf. NLRB v. Express Pub. Co., 312 U.S. 426, 435, 61 S. Ct. 693, 699, 85 L. Ed. 930 (1941) (noting that, except where a specific violation has been found, "Congress did not contemplate that the courts should, by contempt proceedings, try alleged violations of the National Labor Relations Act").

E.

In light of all I have just said, a few caveats are in

---

[15] The court could avoid this problem only by conducting a contempt proceeding that, in every relevant way, duplicated a criminal or civil trial.

order. First, I am not saying that punitive and compensatory contempt sanctions are never appropriate means for enforcing an injunction. For instance, if a party is enjoined to produce certain documents and then destroys those documents, coercive sanctions would no longer be available. Under those circumstances, a punitive contempt sanction would be an important means of vindicating the court's authority. The injunction nevertheless would have been appropriately entered, because coercive sanctions were a viable option at the time the injunction was entered and thus the injunction provided meaningful relief to the adverse party.

Second, a court may enter an injunction that is not enforceable through coercive contempt sanctions when the court enters the injunction in aid of its jurisdiction. For instance, if a government official is enjoined to perform a certain act, and another individual tries to prevent the official from performing the act, the court could issue an injunction commanding the individual to cease his interference. Such an injunction would be appropriate despite not being enforceable through coercive sanctions, because the injunction was not entered as a form of relief for a party to a lawsuit, and thus there is no issue as to whether that party would have an adequate remedy at law. Cf. 18 U.S.C. § 1509 (1994) (authorizing injunctive relief against persons who forcefully interfere with the performance of duties under a court order, regardless of whether the conduct enjoined is also independently criminal).

Finally, I am not denying the importance of the injunction in modern jurisprudence. The principles

outlined above would have permitted, for instance, the use of the injunction in school desegregation cases. In such cases, the defendants were enjoined to undertake a specific, albeit complex, act: Create a unitary school system. Theoretically, the defendants could have been jailed until such time as they complied with the court's mandate.[16] Once the commanded act had been done, however, the court's mandate would have been fully obeyed and any contempt would have been purged.

F.

In conclusion, when a party seeks an injunction to create criminal and/or civil liability via the court's contempt powers, rather than to coerce an adverse party into taking an action required of it, that party is using the legal device of an injunction for a purpose for which it was not designed.[17] See Hecht Co. v. Bowles, 321 U.S. 321,

---

[16] The more common approach was to require school districts to submit to the court a plan for creating a unitary school system; if the plan was approved by the court, the court would retain jurisdiction to see if implementation of the plan succeeded in fulfilling the court's mandate. See, e.g., Brown v. Board of Educ. of Topeka, Kan., 139 F. Supp. 468, 470 (D. Kan. 1955). When various obstacles prevented fulfillment of the mandate – for instance, outside interference or obstinacy by certain officials – courts often issued injunctions in aid of their jurisdiction (sometimes enforceable only through punitive contempt sanctions, as discussed supra) to ensure compliance with their initial orders.

[17] Indeed, if such an action were taken by a plaintiff deliberately, it would likely amount to the tort of abuse of process. Cf. Dykes v.

329, 64 S. Ct. 587, 592, 88 L. Ed. 754 (1944) ("The historical injunctive process was designed to deter, not to punish."). Such an injunction provides no relief for the plaintiff (or at least no relief that could not be obtained at law), and intrudes into areas constitutionally reserved for the legislative and executive branches. Therefore, when a court is faced with a request for injunctive relief, it should consider how the requested injunction is to be enforced. If the injunction cannot be enforced using coercive sanctions, then it should not be entered.[18]

II.

The appellants in this case challenge two sets of

Hosemann, 776 F.2d 942, 950 (11th Cir. 1985) (Tjoflat, J., concurring in part and dissenting in part).

[18] An exception that proves the rule can be found in the area of securities law. Most SEC enforcement actions are resolved by injunctions (entered pursuant to consent decrees) that order the defendant essentially to do nothing more than obey the securities laws. See, e.g., SEC v. Clifton, 700 F.2d 744, 746 (D.C. Cir. 1983). These injunctions allow the SEC to punish repeat offenders without having to bring a separate lawsuit for each offense; instead, the commission needs only to request a show cause hearing to obtain sanctions against the offender. See id. at 748. This practice is permissible, however, only because Congress has specifically authorized it in the Securities Act of 1933. See 15 U.S.C. § 77t(b) (1994); SEC v. Jones, 85 F.2d 17, 17 (2d Cir. 1936) (noting that, because of the Securities Act, the SEC need not allege the absence of an adequate remedy at law when seeking injunctive relief). This specific congressional authorization suggests that such a practice would be impermissible if not so authorized.

provisions in the injunction entered by the district court. The first set of injunctive provisions enjoins the members of the DeKalb County Board of Education and the employees of the DeKalb County school system (such as principals and teachers) not to permit students to engage in various forms of religious activity.[19] For instance, the defendants were enjoined from "permitting . . . vocal prayer; Bible and religious devotional or scriptural readings; distribution of religious materials, texts, or announcements; and discussions of a devotional/inspirational nature" in the DeKalb County schools. The defendants were also enjoined from "permitting . . . prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises." Similar provisions were included in regard to public-address systems and school-sponsored assemblies and events.

These provisions, for the reasons outlined in part I, were entered in error. It is clear that the provisions are not enforceable through coercive sanctions. For instance, assume that a DeKalb County school principal violates the injunction by "permitting" a student prayer at graduation.[20]

---

[19] The members of the DeKalb County Board of Education (and their successors in office) are the defendants in the lawsuit. The injunction extends to the employees of the school system on the ground that they are "in active concert and participation with" the defendants.

[20] In addition to the problems with the injunction outlined above, the injunction's command that the defendants not "permit" certain activity is too vague to satisfy the requirements of Fed. R. Civ. P.

Plaintiff Jesse Chandler is present at the graduation, and, after hearing the prayer, obtains a show cause hearing from the district court.[21] At the hearing, the court holds the principal in contempt. In this situation, the harm sought to be prevented by the injunction – namely, the violation of Chandler's Establishment Clause rights[22] – would already have occurred, and the court could do no more than punish the principal for his contempt or attempt to compensate Chandler for the harm caused. The only form of coercive relief imaginable under the circumstances would consist of

---

65(d). See American Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1411 (11th Cir. 1998); Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1531 (11th Cir. 1996). What exactly does it mean, for instance, for a principal to "permit" a prayer at a school's graduation? Does it mean merely that if he is aware that a student speaker is going to pray, then he must ask the student not to do so? Must he prevent the student from speaking altogether once he is aware that the student is inclined to pray? If a student speaker surprises the principal with a prayer at graduation, must he, at once, rush on stage and attempt physically to remove the student from the microphone? This vagueness makes it impossible for the defendants to know exactly what the injunction requires of them.

[21] The only plaintiffs in the case against the DeKalb County Board of Education are Michael Chandler and his son Jesse, a seventh-grade student in the DeKalb County school system. Michael Chandler appeared as "next friend" for his son.

[22] I seriously doubt, in light of the majority's analysis, that a principal who permits a prayer, without more, has violated a student's Establishment Clause rights. For purposes of my analysis, however, I will assume the correctness of the district court's conclusion to the contrary.

fining or imprisoning the principal until such time as the district court was convinced (presumably on the basis of nothing other than the principal's sincere-sounding promises) that he would not repeat the offense; even then, the coercive sanctions would not have provided Chandler with any relief because the harm would still be fully accomplished. Cf. Gompers, 221 U.S. at 442, 31 S. Ct. at 498. Thus, only punitive or compensatory sanctions would be available.

Insofar as the injunction would be enforced via punitive contempt sanctions, it would provide no direct relief to Chandler. The only benefit it would bring to Chandler would be a deterrent to the principal, one which would be equally available in an action for damages under 42 U.S.C. § 1983 (1994). Thus, the injunction, if enforced by punitive contempt sanctions, gives Chandler no better relief than that which he could obtain at law.

Furthermore, enforcing the injunction with punitive contempt sanctions would raise a separation-of-powers problem. A necessary prerequisite for the issuance of the injunction was the district court's conclusion that the behavior to be enjoined – for instance, permitting a prayer at graduation – would constitute a violation of Chandler's constitutional rights. Therefore, punitive sanctions in response to a violation of the injunction would in essence be punishment for violating Chandler's constitutional rights. The legislature, however, has already prescribed the appropriate criminal punishments for violations of constitutional rights in 18 U.S.C. § 242 (1994), which states that whoever, under color of law, "willfully subjects any person . . . to the deprivation of any rights, privileges,

or immunities secured or protected by the Constitution or laws of the United States . . . , shall be fined under this title or imprisoned not more than one year, or both."[23] The enforcement of this provision is the job of the executive branch, meaning that Congress has determined that the United States Attorney, not the judiciary, is to determine whether the principal should be prosecuted. In such a prosecution, the full panoply of constitutional protections would apply, rather than the limited set that has been held to apply to the imposition of criminal contempt sanctions. See supra note 4. Furthermore, in a criminal prosecution, the principal could raise the defense, based on the "fair warning" requirement of the Due Process Clause, that section 242 does not clearly prohibit "permitting" a prayer at graduation. See United States v. Lanier, 520 U.S. 259, 267, 117 S. Ct. 1219, 1225, 137 L. Ed. 2d 432 (1997) (discussing, in the context of a section 242 prosecution, the constitutional requirement that the statute under which the defendant is prosecuted must have "made it reasonably clear at the relevant time that the defendant's conduct was criminal"). Such a defense would be unlikely to be available in a contempt hearing, because the injunction – unlike the statute – explicitly prohibits this behavior. In sum, criminal sanctions based on this injunction would

---

[23] Conspiracies to violate this provision are outlawed by 18 U.S.C. § 241 (1994), which authorizes fines and imprisonment of up to ten years. Thus, if the United States Attorney could demonstrate that the principal conspired with, for instance, one or more members of the DeKalb County Board of Education to permit the prayer, it could obtain convictions under section 241 in addition to section 242.

constitute interference with the role of both the legislative and executive branches.[24]

---

[24] Congress has responded to this problem to some degree in 18 U.S.C. § 402 (1994), titled, "Contempts constituting crimes." Under that section, where conduct constituting contempt of a district court order also constitutes a crime under federal or state law, the alleged contemnor is entitled to a trial by jury. Furthermore, the contemnor cannot be sentenced to more than six months imprisonment and cannot be assessed a punitive fine of more than $1,000.

One could contend that this statute implicitly authorizes the sort of "end run" around criminal procedure that I am attacking, and thus eliminates any separation-of-powers problem. After all, why would Congress pass a law prescribing procedures and penalties for contempts constituting crimes if it did not consider injunctions necessarily leading to such contempts (if disobeyed) to be acceptable?

A look at the legislative history of section 402 dispels this contention. Section 402 was passed in 1914 to prevent the abuse of labor injunctions. Congress was concerned that corporations were obtaining injunctions forbidding certain union activity; these injunctions were then enforced through summary contempt proceedings. (The constitutional protections that are now available in criminal contempt proceedings, see supra note 4, were not available at that time.) The result was the imposition of penalties for violations of the criminal law, but without the benefit of a jury trial. Section 402 was intended to minimize this problem. See United States v. Pyle, 518 F. Supp. 139, 152 (E.D. Pa. 1981) (discussing legislative history); 48 Cong. Rec. 8778 (1912) ("The courts have, under the guise of contempt of court, had men arrested and tried for crimes without the intervention of a jury." (statement of Rep. Clayton)).

In light of this legislative history, it is difficult to read section 402 as Congress' stamp of approval on injunctions enforceable only through punitive (or compensatory) sanctions. On the contrary, section 402 arises out of disapproval of such

Insofar as this injunction would be enforced via compensatory contempt sanctions, it would merely be imitating the relief available to Chandler under 42 U.S.C. § 1983. Again, as with punitive sanctions, the injunction would give Chandler no relief different from that which he could obtain at law.[25]

It would, however, provide that relief in a manner contrary to that which Congress contemplated in enacting

---

injunctions. See id. at 8779 ("This bill is to prevent a man or, say, a corporation, rich and powerful, getting out a blanket injunction at midnight, broad as the canopy of heaven in its terms, and then oppressing the poor, humble laborer." (statement of Rep. Clayton)). The fact that Congress chose to address the problem by limiting the damage at the back end (when contempt sanctions are imposed) in no way implies approval of the practice at the front end (when the injunction is issued). Cf. id. at 8798 (quoting statement of Rep. Sabath that the bill is not as broad as it should be, but is a step in the right direction).

Furthermore, had Congress intended so radical a move as to abolish completely the longstanding equitable principle that equity will not enjoin a crime, see supra note 14, it surely would have said something to indicate such an intent. Cf. Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S. Ct. 587, 591, 88 L. Ed. 754 (1944) ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."). Nothing in the legislative history suggests that this is the case.

[25] The fact that exhaustion of state remedies is not required in section 1983 actions does not alter the requirement that a plaintiff seeking injunctive relief on the basis of section 1983 must demonstrate the absence of an adequate remedy at law. See Wallace v. Kern, 520 F.2d 400, 407 n.13 (2d Cir. 1975).

section 1983, again creating a separation-of-powers problem.[26] For instance, in a section 1983 proceeding, the principal would be entitled to a trial by jury; this right is not guaranteed in a civil contempt proceeding. Furthermore, in an ordinary section 1983 suit, the principal could respond to the complaint with a motion to dismiss for failure to state a claim. If that failed, the principal could assert a defense of qualified immunity, on the ground that liability for "permitting" a prayer at graduation is not clearly established by Supreme Court or Eleventh Circuit precedent.[27] Neither of these responses is generally available in a civil contempt proceeding. Thus, unless the

---

[26] This problem might not arise if the alleged violation of Establishment Clause rights was caused by a federal, rather than a state, official. Under those circumstances, the congressionally-created remedial scheme of section 1983 would be inapplicable, and a judicially-created remedial scheme based on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), in which a cause of action is implied from the Constitution, would apply. (The adequate-remedy-at-law problem would of course remain.) In this case, however, Congress has created a remedial scheme for the constitutional violation (section 1983) and therefore, in the absence of a showing that the congressional scheme is inadequate, the courts are to defer to Congress. See McCarthy v. Madigan, 503 U.S. 140, 151, 112 S. Ct. 1081, 1090, 117 L. Ed. 2d 291 (1992).

[27] "[T]he qualified immunity test is simply the adaptation of the fair warning standard [from criminal law] to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." Lanier, 520 U.S. at 270-71, 117 S. Ct. 1227.

show cause hearing were in effect transformed into a new section 1983 suit – with a jury trial, the opportunity to raise defenses, and so forth – the court would be violating the doctrine of separation of powers.

The second set of provisions challenged by the appellants, unlike the first set, was perfectly appropriate for inclusion in an injunction. Those provisions relate to the district court's command that the defendants (in conjunction with the plaintiffs) nominate three individuals, one of whom would serve as a monitor for the purpose of ensuring compliance with the injunction. This is a discrete act that, if not taken, could be compelled through coercive contempt sanctions (for instance, a fine of $100 for each day after the deadline that the list of individuals was not submitted). It was therefore properly the subject of an injunction.[28]

In conclusion, the first set of injunctive provisions

---

[28] The unchallenged portions of the injunction are a mix of proper and improper provisions. For instance, in addition to enjoining the defendants from "permitting" certain religious activities, it also enjoins them from "aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise participating in" those activities. Regardless of which gerund is chosen, these injunctive provisions still forbid the performance of an act, and are therefore inappropriate. Other provisions, however, enjoin the defendants to promulgate a written policy relating to religious activity in schools, to provide the Gideons with a copy of the injunction, and to conduct a training session to instruct faculty and administrators regarding the Establishment Clause and the Free Exercise Clause. These provisions command the performance of specific acts, and are thus, at least in form, perfectly legitimate.

challenged by the appellants are enforceable only through punitive or compensatory contempt sanctions. They consequently raise all of the problems discussed in part I, and therefore must be vacated. The second set of provisions, however, raise none of those problems, and, for the reasons stated in the majority opinion, should be affirmed.

III.

The injunction is an important remedial tool, but also one that has been greatly abused. By using an injunction as an alternative means of creating criminal and/or civil liability, courts ignore fundamental equitable and constitutional principles. Certain injunctive provisions at issue in this appeal illustrate this problem. I therefore concur in the majority opinion.

Appendix C

SUPREME COURT OF THE UNITED STATES

MICHAEL CHANDLER, father and
next friend of JESSE CHANDLER,

versus

Case No.
99-935

DON SIEGELMAN, in his capacity as
GOVERNOR OF ALABAMA AND
PRESIDENT OF THE ALABAMA
STATE BOARD OF EDUCATION, *et al.*

(June 26, 2000)

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

Petition for a writ of certiorari granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Santa Fe Independent School District* v. *Doe*, 530 U.S. --- (2000).

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MICHAEL CHANDLER, *et al.*,

Plaintiffs,

v. **CIVIL ACTION NO.**
96-D-169-N

FORREST H."FOB" JAMES JR., et al.,

Defendants.

ORDER

Before the court is a "Motion For Partial Stay Of Permanent Injunction" ("Defs.' Mot.") filed on November 10, 1997 by the Attorney General of the State of Alabama, the Alabama State Board of Education and its individual members, and the DeKalb County, Alabama, Board of Education and its individual members ("Defendants").

Defendants filed a "Memorandum In Support" ("Defs.' Mem. In Supp.") on the same date. Plaintiffs filed their "Opposition To 'Defendants' Motion To Stay' " ("Pls.' Opp'n") on November 18, 1997 to which Defendants filed a Reply ("Defs.' Reply") on November 24, 1997. On the same date, Plaintiffs filed their "Supplemental Opposition To 'Defendants' Motion To Stay' " ("Pls.' Supplemental Opp'n"), and the "Declaration Of Susan Jane Neely In Opposition To 'Defendants' Motion To Stay' Injunction" ("Neely Decl."). On December 5, 1997, Plaintiffs filed their "Reply To '[Defendants'] Reply to Plaintiffs' Opposition To Defendants' Motion For Partial Stay,' " ("Pls.' Reply"), and the Declaration of John Woodfin ("Woodfin Decl.").[1] On December 4, 1997, counsel for the DeKalb County Board of Education and its Superintendent, filed a "Report to Court of Counsel of DeKalb County Board of Education, et al." ("DeKalb Sch. Bd. Report To Ct.") On December 15, 1997, Plaintiffs filed their "Additional Evidence In Opposition To Defendants' Motion For Stay." ("Pls.' Add. Evid.").

Defendants move the court, pursuant to Rule 62 of the

---

[1] Woodfin's Declaration was originally filed in handwritten form as Exhibit B to Plaintiffs' Supplemental Opposition filed November 24, 1997. The December 5, 1997 filing was typed and formally executed.

Federal Rules of Civil Procedure, for a stay of sections 6(a), 6(b), 6(c), 6(d), 6(e) and 7 of the court's October 29, 1997 Permanent Injunction ("Permanent Inj."), pending review by the Eleventh Circuit Court of Appeals. (Defs.' Mot. at 1.) Defendants contend that these sections of the Permanent Injunction are "vague and overbroad." (Defs.' Mem. In Supp. at 1.) Plaintiffs argue that the "proscriptions are all specific and under the totality of the circumstances give ... an extremely clear understanding of the conduct that is proscribed." (Pls.' Opp'n at 7.) After careful consideration of the arguments of counsel, as well as relevant law, the court finds that Defendants' "Motion For Partial Stay Of Permanent Injunction" is due to be granted as to twelve words of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction, and otherwise denied.

DISCUSSION

On March 12, 1997, the court issued a Memorandum Opinion and Order finding unconstitutional Alabama Code Section 16-1-20.3, Alabama's fourth incantation of a "school prayer" statute. *Chandler v. James,* 958 F. Supp. 1550, 1568 (M.D. Ala. 1997). The challenge to the statute arose in the context of officially initiated, promoted and/or sanctioned religious activity that was occurring in the public schools of DeKalb County, Alabama. On October

29, 1997, the court issued a Permanent Injunction enjoining various state and local officials from enforcing Alabama Code Section 16-1-20.3. (*See* Permanent Inj. at 1-3.) The Permanent Injunction also prohibited a variety of officially initiated, promoted and/or sanctioned activities that the court found to be in violation of the First Amendment.[2] (*Id.* at 3-12.) Provisions were made to ensure compliance and to protect the rights of those citizens who were subject to the activity found unconstitutional. (*Id.* at 3-16.) In the Motion To Stay currently before the court, Defendants do not challenge those portions of the Permanent Injunction prohibiting enforcement of Alabama Code Section 16-1-20.3; their challenge is limited to specific sections of the Permanent Injunction applicable to DeKalb County, Alabama.[3]

For purposes of clarity, and in order to rectify

---

[2] In addition to the March 1997 Memorandum Opinion and Order, the court's findings were articulated in its November 1997 Supplemental Opinion and Order and November 1997 Memorandum Opinion and Order.

[3] The Defendants, speaking through the Attorney General, stated that they are "not challenging this Court's March 12, 1997 Memorandum Opinion, the factual record in this matter, or thirty years of controlling legal precedent.... For purposes of Defendants' Motion For Partial Stay, the Attorney General is only challenging certain provisions of this Court's October 29, 1997 Permanent Injunction." (Defs.' Reply at 2.)

convoluted interpretations of the terms of the court's Permanent Injunction, the court will: (1) state the applicable law; (2) restate the specific provisions of the Permanent Injunction that are at issue; (3) summarize the arguments of counsel; and (4) analyze the arguments of counsel in light of applicable law and the terms of the Permanent Injunction.

I. APPLICABLE LAW

A. Standard Of Review

Rule 62(c) of the Federal Rules of Civil Procedure provides that "the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." *Fed. R. Civ. P.* 62(c). In *Hilton v. Braunskill,* 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987), the Supreme Court stated that:

> Different Rules of Procedure govern the power of district courts and courts of appeal to stay an order pending appeal. *See* Fed. Rule Civ. Proc. [sic] 62(c); Fed. Rule App. Proc. [sic] 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

> (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton, 107 S. Ct. at 2119 (citations omitted).[4] These factors "contemplate individualized judgment in each case, [and] the formula cannot be reduced to a set of rigid rules." *Id.*

Defendants urge the court to also consider their Motion under what they describe as the "alternate standard" outlined by the Eleventh Circuit in *Garcia-Mir v. Meese,* 781 F.2d 1450, 1453 (11th Cir.1986). (Defs.' Mem. In Supp. at 3.) There, the Eleventh Circuit, as quoted by the Defendants, stated that "[o]rdinarily the first factor is the most important ... [b]ut the movant may also have his motion granted upon a lesser showing of a substantial case on the merits when the balance of equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay." (Defs.' Mem. In Supp. at 3 (citing *Garcia-Mir,* 781 F.2d at 1453).) Defendants argue that they are "not only likely to prevail on appeal, but the last

---

[4] The parties agree that these factors guide the court's analysis in assessing a request for a stay. (*See* Defs.' Mem. In Supp. at 3; Pls.' Opp'n at 5-6.)

three factors weigh heavily in favor of granting the stay. Therefore, the movants are entitled to prevail under the Eleventh Circuit's alternate standard." (*Id.*)

As an initial matter, the court notes that in *Garcia-Mir,* the Eleventh Circuit addressed an "emergency motion to stay" filed in the court of appeals, rather than in the district court in which the action originated. *Garcia-Mir,* 781 F.2d at 1451, 1453; *see also, United States v. Bogle,* 855 F.2d 707 (11th Cir.1988) (applying factors articulated in *Garcia-Mir* in context of emergency appeal before the Eleventh Circuit and citing to Eleventh Circuit Rule 27-1(b)).[5] The Eleventh Circuit specifically noted the

---

[5] Eleventh Circuit Rule 27-1(b) provides:

> (b) Emergency Motions.
>
> (1) A party requesting emergency action shall label the motion as "Emergency Motion" and state the nature of the emergency and the date by which action is necessary. The motion or accompanying memorandum shall state the reasons for granting the requested relief and must specifically discuss: (i) the likelihood the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest. Counsel filing the motion shall make every possible effort to serve the motion personally; if this is not possible, counsel shall notify opposing counsel promptly by telephone.
>
> (2) If the emergency motion raises any issue

"emergency" nature of the motion to stay at issue there, and noted the "extraordinarily high standards of review of motions for emergency stays." *Id.* at 1451, 1454. In contrast, the Motion To Stay at issue in this action was filed with *this* court, a United States District Court, not the Eleventh Circuit Court of Appeals, and is in a non-emergency posture.

Utilization of the four *Hilton* factors in an "emergency" context ordinarily entails analysis of substantially more compelling factual and legal circumstances than in ordinary motions to stay. Predictably, that is why provisions are made for

---

theretofore raised in a district court, counsel for the moving party shall furnish copies of all pleadings, briefs, memoranda or other papers filed in the district court supporting or opposing the position taken by the moving party in the motion and copies of any order or memorandum decision of the district court relating thereto. If compliance is impossible or impractical due to time restraints or otherwise, the reason for non-compliance shall be stated.

(3) An emergency motion, whether addressed to the court or an individual judge, ordinarily should be filed with the clerk and not with an individual judge. To expedite consideration by the court in a genuine emergency, counsel may telephone the clerk and describe a motion that has not yet been filed in writing. This is not a substitute for the filing required by FRAP 27(a).

"emergency" motions, and why the factors may be entitled to different weight in that context. In an "emergency" appellate proceeding, emphasis may be placed on the likelihood of success on the merits, in part because the appellate court must determine that the trial court below was "clearly erroneous." *Garcia-Mir,* 781 F.2d at 1453. Once this determination is made, the likelihood of reversal on appeal may justify granting a stay, regardless of the other three factors. That is also why a showing of a "substantial case on the merits" coupled with the other three factors weighing heavily in favor of the movant may justify a stay. *See Garcia-Mir,* 781 F.2d at 1453. Hence, emphasis on the first factor, in those contexts, is warranted.

Tellingly, in *Hilton,* the Supreme Court was not addressing the standards utilized in "emergency" appellate proceedings, or "emergency" district court proceedings for that matter, and made no mention of applying heightened deference to the first *Hilton* factor in district court proceedings. *Hilton,* 481 U.S. at 776-77. The Court was careful to note, however, that "individualized judgments" must be made in each case, and that "the formula cannot be reduced to a set of rigid rules." *Id.* at 776.

Not only do Defendants conveniently fail to note the emergency, appellate, posture of *Garcia-Mir,* as opposed to the non-emergency posture of the Motion To Stay

currently in this court, they also fail to cite the entirety of the Eleventh Circuit's relevant language in *Garcia-Mir* (the language quoted by Defendants is italicized):

> We must always be diffident in interposing the power of an appellate court into the province of the trial court and its orders save upon full briefing and mature reflection by this Court. The grant of an emergency motion to stay the trial court's mandate is thus an exceptional response granted only upon a showing of four factors: 1) that the movant is likely to prevail on the merits on appeal; 2) that absent a stay the movant will suffer irreparable damage; 3) that the adverse party will suffer no substantial harm from the issuance of the stay; and 4) that the public interest will be served by issuing the stay. *Ordinarily the first factor is the most important.* A finding that the movant demonstrates a probable likelihood of success on the merits on appeal requires that we determine that the trial court below was clearly erroneous. But the movant may also have his motion granted upon a lesser showing of a "substantial case on the merits" when the balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay.

Garcia-Mir, 781 F.2d at 1453 (citations omitted). The emphasis placed on the first factor was clearly done in the context of an "emergency" appellate review of a district court order. Use of the *Garcia-Mir* standard by a district court would essentially require the court to determine that it was clearly erroneous in issuing a staying of its order(s). Such analysis would be more appropriate in determining a Rule 59 motion to alter or amend or a Rule 60 motion for relief from a judgment or order--not a motion to stay pending appeal.

Regardless of whether the court applies the *Hilton* factors without emphasis on one over the other, or whether the court applies the *Garcia-Mir* heightened emphasis on the first factor standard, an "individualized judgment" under either leads the court to the conclusion that Defendants' Motion To Stay is due to be granted as to twelve words of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction, and otherwise denied. *See Hilton*, 481 U.S. at 776.

The first *Hilton* factor entails analysis of whether the applicant for the stay has made a "strong showing that he is likely to succeed on the merits," *id.*, while under *Garcia-Mir*, a stay may be warranted if the movant shows the "probable likelihood" of success on the merits. *Garcia-Mir*, 781 F.2d at 1453. This would require a

determination that the trial court was "clearly erroneous." *Id. Garcia-Mir* also allows for the granting of a motion to stay upon a "lesser showing of a 'substantial case on the merits' when the balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay." *Garcia-Mir,* 781 F.2d at 1453. This "lesser showing" is thus nothing more than a conjunctive application of the *Hilton* factors without emphasis on one over the others. A stay is warranted if the movant satisfies *all four* of the elements articulated in *Hilton.* Indeed, the *Garcia-Mir* court noted that even if the movant's likelihood of success on the merits is "substantial," that alone will not support a stay "when the other three factors we must consider point so strongly in the other direction." *Id.* at 1455.

The court's Permanent Injunction was issued after much forethought and deliberation, based on its March 1997 Memorandum Opinion And Order and on its findings based on its review of the record as articulated more fully in its November 1997 Memorandum Opinion And Order and November 1997 Supplemental Opinion And Order. Upon issuance of its Permanent Injunction, the court did not consider the provisions at issue here to be clearly erroneous then, and it declines to so find now. Nor does the court consider the majority of the Attorney General's

objections, arguing that the Permanent Injunction tramples free expression in its proscription of state established religion, to be well founded.

The court finds that Defendants have neither shown that they are likely to prevail on the merits nor that they have a substantial case on the merits. Apparently the court's forty page March 1997 Memorandum Opinion And Order, the court's seventeen page October 1997 Permanent Injunction, the court's twenty-four page November 1997 Memorandum Opinion And Order, and the court's sixty-two page November 1997 Supplemental Opinion and Order did not make the court's findings sufficiently clear or were ignored: the religiously coercive practices that were ongoing in DeKalb County, Alabama, violate the First Amendment to the United States Constitution as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals. These violations necessitated the court's Permanent Injunction.

The court is aware of the narrow scope of the Defendants' Motion; Defendants merely contend that the provisions of the Permanent Injunction proscribing unconstitutional conduct are "vague" and "overbroad," and that they accordingly "hinder" free expression, not that the

underlying actions enjoined are permissible.[6] Nevertheless, as the court has previously made clear, and as the court finds now, given the state of current First Amendment jurisprudence, as articulated by courts with direct authority over this court, as well as the legal standards applicable to the issuance of permanent injunctions, the Defendants have not made a "strong showing" or exhibited a "probable likelihood" of success on the merits. With the exception of a portion of section 6(a) discussed *infra,* the court finds that the Permanent Injunction meets its remedial purpose of proscribing unconstitutional conduct without unduly burdening free expression rights. *See, e.g., Lucero v. Trosch,* 121 F.3d 591 (11th Cir.1997) (citing *Schenck v. Pro-Choice Network,* 519 U.S. 357, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997), and *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994), and utilizing analysis of whether injunction provisions burden more speech than necessary to serve relevant government interests). Indeed, this court champions the free expression rights of the citizens of the State of Alabama and of the United States, exercised, of course, in concert with other First Amendment rights.

The court finds the portions of Plaintiffs'

---

[6] *See* note-3, *supra.*

Memorandum In Opposition regarding Defendants' likelihood of success on the merits on appeal to be clear, concise, eminently well written, and most importantly, a correct review of applicable law. Accordingly, the court adopts those portions of Plaintiffs' Memorandum In Opposition as herein articulated:

> The October 29 injunction should have come as no surprise to anyone at all familiar with Establishment Clause jurisprudence. Public school officials have long been prohibited by the Establishment Clause of the First Amendment to the United States Constitution from inserting religious exercises into school activities. *See, e.g., Lee v. Weisman,* 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) (prayer at graduation assemblies); *Edwards v. Aguillard,* 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987) (requirement to teach "creation science"); *Wallace v. Jaffree,* 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985) (daily prayer in public school classrooms); *Karen B. v. Treen,* 653 F.2d 897 (5th Cir.), *aff'd per curiam,* 455 U.S. 913, 102 S. Ct. 1267, 71 L. Ed. 2d 455 (1982) (classroom prayer by students or teachers); *Stone v. Graham,* 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199

(1980) (posting copy of Ten Commandments on public school classroom walls); *Epperson v. Arkansas,* 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968) (statute prohibiting the teaching of evolution); *Abington Schl. Dist. v. Schempp,* 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (Bible reading before class by student volunteers); *Engel v. Vitale,* 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962) (nonsectarian prayer at beginning of school day); *Illinois ex rel. McCollum v. Board of Educ.,* 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948) (religious instruction on school property during school day). These unconstitutional school-sponsored activities are not transformed into constitutional activities by the involvement of willing students. *See Schempp,* 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 44 (student-led devotional readings in the classroom); *ACLU v. Black Horse Pike Regional Bd. of Educ.,* 84 F.3d 1471 (3d Cir.1996) (*en banc*) (student-initiated prayer at graduation); *Ingebretsen v. Jackson Public Schl. Dist.,* 88 F.3d 274 (5th Cir.), *cert. denied,* --- U.S. ----, 117 S. Ct.

388, 136 L. Ed. 2d 304 (1996)[7] (student initiated prayer at compulsory and noncompulsory school sponsored events); *Jager v. Douglas County Bd. of Educ.*, 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (1989) (student-led prayers and invocations at high school sporting events);[8] *Hall v. Board of Schl. Comm'rs of Conecuh County*, 656 F.2d 999 (5th Cir. Unit B 1981) (student-led morning devotionals over the school intercom); *Collins v. Chandler Unified Schl. Dist.*, 644 F.2d 759 (9th Cir.1981) (student-led prayer at school

---

[7] *Ingebretsen*, constrained by *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir.1992), held that "nonsectarian, nonproselytizing student-initiated prayers" at graduation ceremonies did not violate the Establishment Clause, while simultaneously holding that those same prayers at all other school-sponsored compulsory or noncompulsory activities did. The Fifth Circuit is the only Circuit to adopt the graduation ceremony exception to the Establishment Clause, and the Fifth Circuit's rule is directly defiant of *Lee v. Weisman*.

[8] Although one might think that any claim of success on appeal in the Eleventh Circuit would focus on the leading Eleventh Circuit case, *Jager v. Douglas County Board of Education*, 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (1989), *Jager* is almost completely absent from the Attorney General's discussion, making only a brief parenthetical appearance on page 13 of the Motion for Partial Stay.

assemblies); *Karen B. v. Treen,* 653 F.2d 897 (5th Cir.1981), *aff'd per curiam,* 455 U.S. 913, 102 S. Ct. 1267, 71 L. Ed. 2d 455 (1982) (student-led prayers in the classroom).

The "free exercise" and "free speech" rights of students do not trump the Plaintiffs' rights to be free of Establishment Clause violations. The plaintiffs have argued this since the inception of this case, and the court so found in citing *Barnette, Schempp,* and *Jager.* None of this record supports the Attorney General in what the plaintiffs take to be a motion to stay premised on the allegation that the injunction amounts to viewpoint discrimination, and the pretense that it does is at odds with the record. [12]

---

[12]This Court might well say, like the *Ingebretsen* court:

> The Attorney General's ... proffered secular purpose of prayer at student sporting events--prohibiting viewpoint discrimination--must be rejected out of hand. While the United States Supreme Court has recognized that prohibiting viewpoint discrimination may serve a secular purpose, *see Mergens,* 496 U.S. at 248, 110 S. Ct. at 2370, the Attorney General has not shown that any of the forums where student prayer is authorized under the statute are open forums and that religious groups have been denied access. The *Mergens* line of cases cited by the Attorney General involves situations

Relatedly, free speech rights are not absolute. Where "the degree of captivity makes it impractical for the unwilling viewer to avoid exposure," a speaker does not have the absolute right to say exactly what he wants. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 209, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975). While a speaker "clearly has a right to express his views to those who wish to listen, he has no right to force his

---

> where religious groups sought access to public school facilities and were denied for fear that access to these facilities by religious groups would violate the Establishment Clause.... We are not faced with such a situation here. Student assemblies, student sporting events, graduation or commencement, and other school-related activities ostensibly are not open forums in public schools. By granting prayer an exalted status over other types of speech in these forums, the state runs the grave risk of favoring one religion over another or favoring religion over irreligion. *See Board of Educ. of Kiryas Joel v. Grumet,* 512 U.S. 687, 114 S. Ct. 2481, 2491, 129 L. Ed. 2d 546 (1994).

Ingebretsen, 864 F. Supp. at 1490.

The record here shows no instance in which a religious group has ever been denied anything in DeKalb County. Quite the opposite is true; the Gideons have been handed the classrooms. The plaintiffs repeat, as they have argued throughout this case, that violating the Establishment Clause is not a free speech or free exercise right.

message upon an audience incapable of declining to receive it." *Lehman v. City of Shaker Heights,* 418 U.S. 298, 307, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974) (upholding a ban on political ads in rapid transit cars based upon the captive audience). *See also Frisby v. Schultz,* 487 U.S. 474, 487-88, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) (allowing a city to limit picketing in front of homes so as to protect persons from unwanted speech while at home).

Students enjoy even less freedom to speak their minds while under the supervision of the public schools. In *Bethel School District v. Fraser,* 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), cited by the Attorney General, the Court recognized that the free speech rights of students are not co-extensive with the free speech rights of adults. *Id.* at 682. The *Fraser* Court also noted "the obvious concern on the part of parents and school authorities ... to protect children--*especially in a captive audience* --from exposure to" certain speech in school assemblies. *Id.,* 478 U.S. at 684 (emphasis added). *See* Mem. Op., Mar. 12, 1997 at 21 (*quoting Fraser.*)

Previously, in *Tinker v. Des Moines Independent*

School District, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), the Court discussed the limitations on students' rights to speak freely: "[C]onduct by the student, in class or out of class, which for any reason--whether it stems from time, place or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513. *See* Mem. Op., Mar. 12, 1997 at 20 (*quoting Tinker*). While the Supreme Court held that the *Tinker* student had a First Amendment right to engage [sic] in the activity at issue (the wearing of a black armband), it first held that this speech did not "impinge upon the rights of other students." 393 U.S. at 509.

The *Jager* court addressed the same concerns raised by the Defendants in this case, and concluded that student-initiated prayers, even at "noncompulsory" events such as football games, violate the Establishment Clause.

In *Jager,* the defendant high school had a practice of permitting prayers and invocations immediately prior to the high school's home football games. *Jager,* 862 F.2d at 826. The prayers were

explicitly Christian, "frequently invok[ing] the name of Jesus Christ," and were delivered by members of the local Protestant clergy. *Id.* at 826, 841 n. 2. Since at least 1947, these pregame prayers had been a part of the defendant's football season. *Id.* at 841 n. 2. In response to complaints about the old policy, the school developed a new policy:

> All school clubs and organizations can designate club members to give invocations and any student, parent, or school staff member can seek to deliver an invocation ... the student government will randomly select the invocation speaker and no ministers will be involved in selecting invocation speakers or in delivering invocations. In addition, the schools will not monitor the content of the invocations.

Jager, 862 F.2d at 827.[13] Despite these innovations, the *Jager* court still concluded that the policy was in violation of the Establishment Clause.

Lee indicates how right the Eleventh Circuit was

---

[13] As noted earlier, this was not an official Douglas County School Board policy but rather, vested discretion in school principals.

in *Jager*. The Supreme Court's holding in *Lee* is summarized in its last paragraph which, like the vast majority of the decision, makes no reference to the fact that the prayer was offered by clergy under some particular guidelines and does not take into account the identity of the speaker:

> **The sole question presented** is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

Id., 505 U.S. at 599 (emphasis added). In short, the sole *relevant* facts are the same here as in *Lee:* (1) prayer in a school program, and (2) a coerced plaintiff. (Pls.' Mem. In Opp'n at 32-38.) Based on the foregoing, the court finds that the first *Hilton* factor cuts against the Defendants.[14]

---

[14] The court addresses the hypotheticals proffered by the Attorney General in support of his "likelihood of success on the merits" argument, *infra*.

> In addition, the other three *Hilton* factors strongly favor Plaintiffs' position. The second and third factors essentially require the court to weigh the harm that Defendants may incur absent a stay against the harm that Plaintiffs may incur should a stay be granted. Defendants argue that "the movants and other citizens of Alabama are likely to suffer irreparable harm if this Motion is not granted." (Defs.' Mot. at 2.) Closely associated with the court's analysis of the second and third factors are Defendants' contentions regarding the fourth factor: "whether the granting of the stay would serve the public interest." Defendants argue that "the public interest would be served by granting [a stay] in order that the status quo may be preserved pending appeal." (Defs.' Mot. at 2.) Essentially, the Attorney General argues that because he reads the injunction as unduly limiting free expression rights, the better path would be to preserve the status quo pending appeal. Plaintiffs counter that "the *status quo* has been an illegal state of affairs in DeKalb County, Alabama."

(Pls.' Opp'n at 6 (emphasis in original).)

As noted, the court finds that Defendants have not shown a likelihood of success on the merits; specifically,

that the court's Permanent Injunction does not unduly burden free expression rights in its preservation of individual liberties and proscription of state established religion. Additionally, throughout its previous Orders, the court has expressed its findings that public policy favors Plaintiffs in this action. The status quo, which the Attorney General urges this court to continue, includes, but is not limited to, state sponsored and officially sanctioned religious activity in the DeKalb County schools. Indeed, the Attorney General is not challenging the factual record or thirty years of controlling precedent. (Defs.' Reply at 2.) Nevertheless, by tying arguments urging preservation of the status quo because of what the Attorney General perceives to be an undue burden on free expression rights with analysis under *Hilton* 's harm to the Defendants and public interest factors, the Attorney General essentially argues for preservation of majoritarian will. As the Attorney General should know, however, the will of the majority makes for sound argument in election disputes and political grandstanding; not in the analysis of First Amendment jurisprudence prohibiting officially sanctioned religious activities that violate the First Amendment.

At a minimum, the status quo in DeKalb County violates the First Amendment's dictate that states "pursue a course of complete neutrality toward religion." *Jager v.*

Douglas County School Dist., 862 F.2d 824, 828 (11th Cir.1989) (citing *Wallace v. Jaffree*, 472 U.S. 38, 60, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985)).[15] Further, the status quo violates the interests of those counter-majoritarian citizens who choose to exercise religious beliefs, or who choose to not exercise religious beliefs, by forcing upon them, in an official setting, religious beliefs and practices that they may find unwelcome and that smack of state indorsement. The exercise of free expression rights do not justify violations of the Establishment Clause. *See, e.g., Bethel School District v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed.2d 125 (1975); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed.2d 731 (1969). Consequently, the court finds no merit in Defendants' argument that execution of the Permanent Injunction will result in the harm anticipated by the Defendants.

In addition, the court finds that absent execution of the Permanent Injunction, Plaintiffs will most surely suffer

---

[15]The Attorney General appears to recognize this established principle of First Amendment jurisprudence. (*See* Defs.' Mem. In Supp. at 21-22 n. 6.)

those harms that the Permanent Injunction specifically endeavors to prevent. Defendants will continue to violate Plaintiffs' rights, as evidenced by their unwillingness to comply with the court's Permanent Injunction, or, for that matter, with Supreme Court and Eleventh Circuit precedent detailing proscribed activity. Despite Defendants': (1) admission that they are "not challenging the court's March 12, 1997 Memorandum Opinion, the factual record in this matter, or thirty years of controlling precedent," (Defs.' Reply at 2); (2) admission that "educators within Alabama's public schools [do not] have the right to subject students to unwanted religious indoctrination," (Defs.' Reply at 7); and (3) recognition of the clear holding of the Eleventh Circuit in *Jager,* where, in the Attorney General's own words, "the court struck down a school district practice of authorizing and organizing invocations to be given prior to public high school football games," (Defs.' Reply at 9 (citing *Jager,* 862 F.2d 824 (11th Cir.1989)), Defendants' *actions* indicate the contrary.

Two Declarations filed by the Plaintiffs on November 24, 1997,[16] to which the Defendants have notably failed to

---

[16]The Declaration of Susan Jane Neely was filed November 24, 1997. On the same date, Plaintiffs filed their "Supplemental Opposition To 'Defendants' Motion to Stay,' " which contained the

respond, allege that the following occurred at a November 7, 1997 Sylvania High School football game:[17]

> 1. At about 7:00 p.m., a voice came over the P.A. The voice said there was someone there who had a special message for us. A second voice told us that a recent ruling had banned prayer in school. He said that they wanted us to help them send a message to the federal government and the rest of the country. This voice also said that he had the full support of Fob James, the Governor of Alabama.
>
> 2. All of the students were asked to go down to the football field, join hands, and form a circle. The stands cleared, as children from probably kindergarten up to twelfth grade made their way to the field. The circle stretched the width and length of the field, and consisted of students, band members, and cheerleaders. Then a man, middle-aged, wearing glasses, and on crutches because he

---

hand-written statement of John Woodfin. Woodfin's typed and executed Declaration was filed December 5, 1997.

[17] Sylvania High School is one of the public schools located in DeKalb County, Alabama. The court's Permanent Injunction was issued October 29, 1997; the described activities occurred subsequent to, and in specific defiance of, the injunction.

> only had one leg, walked to the middle of the circle. He told all of the children to get down on their knees and raise their hands to heaven. He told them to raise their hands up high because there might be someone there who needed to see this. Next, he said that they were going to pray to their god. There was a brief moment of silence, and then the man led these students in prayer, the Lord's Prayer.

(*See* Neely Decl. ¶ ¶ 1, 2; *see also* Woodfin Decl. (describing same activity).) In addition, Gary Carlyle, Principal of Sylvania High School, wrote letters to both the Montgomery Advertiser and the Birmingham News that, at best, evidence misunderstanding of the terms of the Permanent Injunction, and at worse, when read in conjunction with the activities described in the Neely and Woodfin Declarations, evidence deliberate defiance. (*See* Pls.' Supplemental Opp'n, Exs. A, A-1.)

Moreover, on November 4, 1997, the Governor of Alabama--a Party to this action--issued a Statement regarding the court's Permanent Injunction. In this Statement, the Governor asserted that the children of the nation's founders "had the benefit of prayer in school," and after reiterating his desire that this court decline to follow United States Supreme Court precedent and instead follow

the Governor's interpretation of the United States Constitution, stated: "I will resist Judge DeMent's order by every legal and *political* means with every ounce of strength I possess."[18] (*See* Pls.' November 6, 1997 Mot. To Enjoin Proceedings in the Etowah County Circuit Ct., Ex. B (emphasis added).)

Based on these explicit and implicit indicia of noncompliance and purported and actual defiance of the law, as well as the myriad media reports that have been called to the court's attention, of which the court takes judicial notice, but on which the court does not rest its findings, it is clear that DeKalb County has allowed prayer at a high school football game in contravention of *Jager* and in specific defiance of the Permanent Injunction, and

---

[18]For an extensive overview of the Governor's unique interpretation of the United States Constitution and his misguided opinion as to why lower federal courts are not bound by Supreme Court precedent, see the thirty-four page June 1997 letter from Governor James to the court. In addition to the record, the text of the letter may be viewed, as of December 15, 1997, via the Internet at <http://alaweb.asc.edu/govoff.html>. *See also* Fob James, Jr., *DeMent Followed High Court Deceit,* Birmingham News, December 7, 1997, at 1C.

It is indeed ironic, as Plaintiffs note, that Governor James "simultaneously contend[s] that the Court has no jurisdiction over the first amendment and then support[s] a stay of the Court's injunction on the ground that it infringes on students' first amendment rights...." (Pls.' Reply at 21-22.)

that the state chief-executive has promised political defiance.[19] It is clear that absent the Permanent Injunction remaining in effect, constitutional violations will continue, as indeed they *have* continued. Consequently, Plaintiffs have and will continue to suffer significant harms.

Contrary to majoritarian wishes, the State of Alabama cannot establish an official religion, either explicitly or implicitly, and officially-sanctioned religious activity in public schools can and must be prohibited to protect the rights of *all* of the citizens of Alabama.[20] On balance, the

---

[19] The court has no qualms regarding the Governor's promise of *legal* resistance to the court's Orders, and indeed encourages the pursuance of an appeal. Such is the proper procedure for addressing and resolving purported discrepancies in court orders.

[20] The court suspects that if the Permanent Injunction enjoined non-majoritarian religious, or for that matter atheist or agnostic, beliefs and practices from being forced on school-children in DeKalb County, certain state officials would be first in line to seek enforcement of the court's Permanent Injunction. Such religious prejudice is one of the reasons our forefathers left England for America, and one of the reasons the First Amendment prohibits state-established religion. (*See* November 1997 Supplemental Op. and Order at 60-61 n. 54); *see also Engel*, 370 U.S. at 432. "The right to be free from state-established religion lies at the heart of the concept of 'freedom of religion' embodied in the First Amendment." (November 1997 Supplemental Op. and Order at 61 n. 54 (citing *Lee*, 505 U.S. at 591).) "The individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority." *Wallace*, 472 U.S. at 60.

court finds it more likely that Plaintiffs, and other citizens, will be substantially injured by a stay of the Permanent Injunction than that Defendants will suffer irreparable harm as a result of the enforcement of the Permanent Injunction. Accordingly, the court finds that *Hilton* 's second and third factors cut against the Defendants and that *Hilton* 's public interest factor favors denial of the Motion To Stay, as well.

B. Interpretation Of The Permanent Injunction

The Defendants contend that the provisions of the Permanent Injunction at issue are "*facially* unconstitutional," (Defs.' Reply at 2 (emphasis in original)), and that "facial challenges to government enactments must be decided by reference to the contents of the restrictive language in question." (Defs.' Reply at 5.) Under the Attorney General's analysis, the court must look only to the language of the Permanent Injunction itself (on its face) in determining whether it passes constitutional muster or whether the provisions are vague and overbroad, as Defendants contend. (*See generally* Defs.' Reply at 2-6.) When so read, Defendants argue, "[t]hese provisions ... are *facially* unconstitutional, without regard to this Court's previous Orders or the factual basis from which this case arose." (Defs.' Reply at 2 (emphasis in

original).)[22]

Plaintiffs counter that the Defendants not only ignore the plain language of the Permanent Injunction, (Pls.' Opp'n at 10), but that the correct " 'inquiry should be whether the parties subject to the injunction understood their obligations under the order.' " (Pls.' Opp'n at 6 (quoting *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 978-79 (11th Cir. 1986), *cert. denied*, 479 U.S. 853, 107 S. Ct. 187, 93 L. Ed. 2d 120 (1986)).) Plaintiffs urge a reading of the Permanent Injunction in context, and contend that when so read, the "proscriptions are all specific and under the totality of the circumstances give DeKalb County an extremely clear understanding of the conduct that is proscribed." (Pls.' Opp'n at 7.)

In contrast to Defendants' argument that only the face

---

[22]Interestingly, the Attorney General also states that he "does not dispute Plaintiffs' contentions that the Permanent Injunction should be read in light of this Court's previous rulings." (Defs.' Reply at 3.) The Attorney General then takes the position that "the Permanent Injunction is *inconsistent* with this Court's previous rulings and controlling Supreme Court precedent. For these reasons, Defendants believe that this Court must stay those provisions of the Permanent Injunction which were specified in Defendants [sic] Motion for Partial Stay." (*Id.*) Although not clear, the Attorney General appears to be arguing that the challenged provisions of the Permanent Injunction are unconstitutional on their face, *or*, when read in conjunction with the court's previous Orders, are inconsistent with those Orders, and thus unconstitutional.

of the Permanent Injunction should be read in construing its terms, the Eleventh Circuit noted in *Combs* that:

> A court may also disregard [a] defect [in an injunction] *if it is clear from the totality of the language in the various documents that [those enjoined] understood their obligations under the injunction. United States v. Goehring,* 742 F.2d 1323, 1324 (11th Cir.1984) (*per curiam*) (Rule 65(d) not specifically invoked, but contempt order upheld that incorporated earlier order because later order "contains sufficient findings of fact and conclusions of law for this court to perform its proper function and for the appellant to clearly understand the basis for the contempt order.")

Combs, 785 F.2d at 978 (emphasis added). *See also Lucero v. Chadwick,* 121 F.3d 591 (11th Cir.1991) (citing *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994))(interpreting injunction in light of *the record* before the court); *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982)(reviewing the *facts in the record* before the court in analyzing the remedial nature of an injunction). Notably, the Attorney General fails to address or apply these holdings. The court finds that when read in conjunction with the court's other Orders, or even when

read facially, the Parties enjoined understand their obligations under the Permanent Injunction, and except as noted, *infra,* the provisions of the Permanent Injunction challenged by the Attorney General are constitutionally sound, are not vague and overbroad, and are in conformance with standing Supreme Court and Eleventh Circuit precedent.

In contrast to disagreeing about whether the Permanent Injunction, as a whole, should be read standing alone or in conjunction with other pleadings, the Parties agree that internally, "the Injunction must clearly and sufficiently delineate permissible and impermissible conduct." (Defs.' Reply at 9; Pls.' Opp'n at 6 ("The parties being enjoined have the right to know what activities are prohibited").) What is required is "the language of the injunction to be as specific as possible under the totality of the circumstances, such that a reasonable person could understand what conduct is proscribed." *United States v. Kaun,* 827 F.2d 1144, 1153 (7th Cir.1987); *see also Howard Johnson Co., Inc. v. Khimani,* 892 F.2d 1512, 1516 (11th Cir.1990) (utilizing "reasonable person" standard in interpreting provision of a district court's permanent injunction and upholding finding of contempt); *Fed. R. Civ. P.* 65(d) (injunctions should "describe in reasonable detail ... the act or acts sought to be

restrained"); (Defs.' Mem. In Supp. at 5 (citing to *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926) for the correlative principle that "a statute is void if *persons of common intelligence* must necessarily guess at its meaning and differ as to its application") (emphasis added)). Rule 65 is not to be applied strictly; the inquiry is whether the "parties subject to the injunctive order understood their obligations under the order." *Williams v. City of Dothan, Ala.*, 818 F.2d 755, 761 (11th Cir.1987) (citing *Combs*, 785 F.2d at 978-79).

The Attorney General asserts that "school administrators all across the state are questioning the meaning of this Court's Permanent Injunction." (Defs.' Reply at 3 n. 2.) This assertion is unsubstantiated by any supportive filings, and noticeably fails to address the question of whether the *DeKalb County Board of Education and its individual members* understand its/their obligations under the Permanent Injunction.[23] In contrast

---

[23] It is indeed ironic that the Attorney General claims state-wide mass confusion in one forum--this court, but then states that the Permanent Injunction applies only to DeKalb County in another--the media. (*See* Attachment B, December 8, 1997 Press Release from the Office Of The Attorney General ("AG December 8, 1997 Press Release") (stating that "many people in Alabama mistakenly believe the recent federal injunction strictly regulates religious expression in every school in the state, when in fact, these prohibitions only apply to the DeKalb County school system"); *see also*, Pls.' Add.

to the Attorney General's unsupported, self-serving assertion, the DeKalb County Board of Education ("School Board"), *the entity for which the Attorney General purports to speak,* has submitted its "Report to Court of Counsel of DeKalb County Board of Education, et al." In that document, the School Board, individually and acting as a School Board, and the Superintendent, acting through counsel, delineated their efforts "to comply with all open orders of this court in good faith." (DeKalb Sch. Bd. Report To Ct. at 1.) Counsel for the School Board indicated that the following activities had been undertaken pursuant to the court's previous Orders and the court's Permanent Injunction:

(1) A September 30, 1997 in-service for principals, assistant principals and certain administrative personnel of the DeKalb County School System. (*Id.*)

(2) Distribution, at the September 30, 1997 in-service, of a memorandum, composed by School Board legal counsel, explaining the court's Orders and including a copy of the court's March 12, 1997 Memorandum Opinion and Order. (*Id.* at 2.)

(3) The distribution of a memorandum concerning "Student Prayer *en mass* During Lunch" to all principals

---

Evid.)

and other interested persons in the DeKalb County School System on October 2, 1997. (*Id.*)

(4) The mailing of information to all principals, teachers and administrative personnel concerning questions involving religious activities in school on October 21, 1997. (*Id.*)

(5) Submission of a memorandum concerning "Religion in Schools" on October 24, 1997. (*Id.*)

(6) Distribution of documents entitled "Outline of Permanent Injunction of October 29, 1997, What the Board of Education Must Do," and "Outline of Permanent Injunction of October 29, 1997, What We Can and Can't Do" across the DeKalb County School System and to any interested citizen on October 29, 1997. (*Id.* at 5-6.)

(7) Distribution of a position paper or November 5, 1997. (*Id.* at 6.)

Additionally, the Report indicates that the School Board and the Superintendent have undertaken the following in compliance with the Permanent Injunction:

October 30--Memo to Superintendent outlining proposed in-service for principals.

October 31--Principal's in-service meeting. Copies of the following given to each principal:

Permanent Injunction

Timeline of Major Required Activities

Riley Letter

Outline of Permanent Injunction

Copy of Alabama Code 16-1-20.3

November 4--Letter to Gideon's International with copy of Permanent Injunction attached.

November 4--Memo outlining conversation with Mr. Jay Kaiman, Anti-defamation League.

November 6--Memo to Superintendent outlining proposed meeting with local Gideons.

November 8--Meeting with local Gideons. Copies of Permanent Injunction distributed.

November 10--Notification of Permanent Injunction to all teachers.

November 10--Meeting with Association Teacher Representatives, DeKalb County Education Association.

November 12--Memo concerning proposed meeting with Assistant Principals.

November 14--Memo outlining discussion points with Charles Haynes, First Amendment Center.

November 14--Memo to all school [sic] asking for names and addresses of all PTO officers.

November 18--Letter to Plaintiff's [sic] Attorney proposing candidates for monitor and copy of "Finding Common Ground" for preview.

November 24--Fax communication from First

Amendment Center.

November 25--Board of Education approves policy "Distribution of Literature--Student Rights and Protection". [sic]

November 25--Copy of proposed policy mailed to Plaintiff's [sic] Attorney.

(DeKalb Sch. Bd. Report To Ct. at 3-4.)[24]

---

[24] The reporting Defendants further informed the court that "substantial pressure has been exerted toward persons attempting to comply with the orders of this court. The defendants have experienced great criticism regarding their position." (DeKalb Sch. Bd. Report To Ct. at 4.) In addition to copies of the distributed documents outlined above, copies of representative articles, editorials, and letters published since September 30, 1997 for and against the position of the reporting Defendants were attached. (*Id.*)

The court notes the difficult position in which some enjoined Defendants are placed by the provisions of the court's Permanent Injunction. Nevertheless, appointment or election to public office does not justify imposition of personal or political views contrary to established law. There is no doubt that some of the criticism is heightened by political agitation. But, the DeKalb School Board and its individual members would not have found themselves "experienc[ing] great criticism regarding their position" if they had complied with long-standing legal precedent from the beginning. While the court is sympathetic to Defendants' situation, it is, ultimately, one of their own making.

The court does, however, recognize and specifically command the School Board, its Superintendent, and their counsel for their good faith efforts to comply with the Orders of the court. Apart from the November 7, 1997 activities at a Sylvania High School football game, *which greatly concern the court,* and which should also greatly concern the School Board,

To ensure that enjoined parties receive adequate notice of the precise conduct that is prohibited, Rule 65 requires that an injunction be specific in its terms and describe in reasonable detail the act or acts enjoined. *Fed. R. Civ. P.* 65(d); *Alabama Nursing Home Association v. Harris,* 617 F.2d 385 (5th Cir.1980).[25] In reading the terms of an injunction, the *Harris* court noted that "[a]n injunction does not prohibit those acts that are not within its terms as *reasonably construed.*" *Harris,* 617 F.2d at 388. In *Schering Corp. v. Illinois Antibiotics Co.,* 62 F.3d 903 (7th Cir.1995), *reh'g denied* (Sept. 12, 1995), the Seventh

---

a cursory review of the December 4, 1997 Report To Court, along with its attachments, evidence a concerted effort to not only rectify, but to educate, inform, and to obey the law, like it or not. As counsel for the School Board noted in an October 21, 1997 memorandum to DeKalb County School System principals, teachers, and administrative personnel addressing questions concerning religious activity in school: "The school prayer case is bleeding our educational system here in DeKalb County of financial resources we desperately need. Our teachers need to recognize this fact and govern themselves accordingly.... *If you are not running for public office, or have some other hidden agenda, please become part of the solution and don't become part of the problem.*" (DeKalb Sch. Bd. Report To Ct., October 21, 1997 Mem. at 7-8 (emphasis added).)

[24] Decisions of the former Fifth Circuit rendered prior to October 1, 1981, constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

Circuit articulated why a *reasonable* construction is necessary: "[T]he rule of strict construction of injunctions should not be pressed to a dryly logical extreme. If narrow literalism is the rule of interpretation, injunctions will spring loopholes ... and parties in whose favor injunctions run will be inundating courts with requests for modification in an effort to plug the loopholes." *Id.* at 906. Equally apparent is that unreasonable constructions and "narrow literalism" will lead to precisely the type of hypothetical "loopholes" offered by the Attorney General as examples of the Permanent Injunction's infirmity. The terms of the court's Permanent Injunction must be read reasonably, logically, and in their entirety; not in the selective splicing of words and phrases that inundate the Attorney General's Motion and Memorandum In Support thereof. [24]

---

[24] The Attorney General appears to recognize the basic maxim that particular words and phrases in any judicial order or legislative enactment should ordinarily be read logically and consistently with the other words and phrases in the same sentence, paragraph, and/or Order, as applicable. In Defendants' Reply, the Attorney General cites *United States v. Kaun,* 827 F.2d 1144 (7th Cir.1987) "for the principle that the injunction should be viewed under a totality of circumstances through the eyes of a reasonable person." (Defs.' Reply at 4.)

Nevertheless, as Plaintiffs note, in challenging provisions of the Permanent Injunction as vague and overbroad, the Attorney General's "examples are themselves vague, being spectres intended

Following, is a restatement of the challenged provisions of the Permanent Injunction followed by a summarization of the Attorney General's objections. Except for the court's analysis under section 6(e), the court's analysis of the Attorney General's objections follow this restatement and summarization.

1. *Section 6(a)*

In its entirety, section 6(a) of the court's Permanent Injunction reads as follows:

> (a) *Regarding Classroom Activities and Instructional Settings.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or permitting *school organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to:* vocal prayer; Bible and religious devotional or scriptural readings; distribution of religious materials, texts, or announcements; and

---

to induce fear and horror, rather than concrete factual situations." (Pls.' Opp'n at 9.) Certainly the majority of the Attorney General's "narrow literalism" is not in keeping with *Harris* ' admonition to reasonably construe the terms of an injunction or with the Attorney General's own reading of *Kaun.*

discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students.

This PERMANENT INJUNCTION DOES NOT proscribe the educational use of religious texts in the classroom to the extent that material so used is presented in an objective and academic manner, for example, as part of a course of study.

This PERMANENT INJUNCTION DOES NOT proscribe students' voluntary expression of their own religious beliefs in the form of homework, reports, artwork, or other school assignments as applicable and as academically appropriate.

This PERMANENT INJUNCTION DOES NOT proscribe the display of religious symbols, articles and medals (for example, Crosses and Stars of David) and/or clothing bearing religious messages (provided that the school allows students to display non-religious expressive symbols and apparel and such display is in accordance with all applicable time, place, and manner restrictions).

> This PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071 *et seq.*, or to quietly engage in religious activity during noninstructional times, *so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves.*
>
> This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place, and manner restrictions imposed on student distributions of nonreligious materials, subject to the provisions of paragraph 6(e) below.

(*See* Permanent Inj. at 3-4 (emphasis in original).) Not only a reasonable reading, but even a narrowly literal reading, discloses that what this provision prohibits is:

(1) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to* vocal prayer.

(2) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to* Bible and religious devotional or scriptural readings.

(3) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to* distribution of religious materials, texts, or announcements.

(4) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to* discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students.

Clearly, this provision enjoins *school organized,* or *officially sanctioned* religious activity.[25] As other provisions of the Permanent Injunction clearly articulate, **students are free to engage in any or all of these activities as long as they are not *school organized* or**

---

[25]The Attorney General admits that he is not challenging "*the Permanent Injunction's proscriptions with regard to school sponsored, officially organized religious activity,*" and that "[t]his law is settled." (Defs.' Reply at 10 (emphasis in original).) Nevertheless, the Attorney General then proceeds to challenge section 6(a), which a literal reading discloses merely enjoins "*school organized* or *officially sanctioned* religious activity." (Permanent Inj. at 3.)

officially sanctioned. For example, as the court took pains to note, the Permanent Injunction does not proscribe: (1) the educational use of religious texts in the classroom to the extent that the material is presented in an objective and academic manner; (2) students' voluntary expression of their own religious beliefs in the form of various school assignments as applicable and as academically appropriate; (3) the display of religious symbols or clothing bearing religious messages consistent with a school's applicable time, place and manner restrictions; (4) secondary-school students from engaging in religious activity during noninstructional time consistent with the Equal Access Act; (5) secondary-school students from "quietly engag[ing] in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves" (Permanent Inj. at 4);[26]

---

[26] The Attorney General particularly objects to the word "quietly" and the phrase "so long as it does not unduly call attention thereto" in one paragraph of section 6(a) as unduly vague and in violation of *Tinker v. Des Moines School District,* 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). (Defs.' Mem. In Supp. at 8.) Specifically, *Tinker* provides that proscriptions be tailored to "the requirements of appropriate discipline in the operation of the school." *Id.* at 509.

In context, these words are part of section 6(a)'s proscription of school organized or officially sanctioned religious activity. They

are stated in the fourth of four paragraphs detailing what the Permanent Injunction *does not* proscribe. They are part of the court's notation that "[t]his PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act ..., or to *quietly* engage in religious activity during noninstructional times, *so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves.*" (Permanent Inj. at 4 (italics in original) (underlining added).)

Consistent with *Tinker*, and with the court's emphasis on applying identical time, place, and manner restrictions to religious and other types of conduct, a more detailed enunciation perhaps could read: "This PERMANENT INJUNCTION does not affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act ..., or to engage in religious activity during noninstructional times *so long as it does not interfere with the rights of other students, is consistent with the school's applicable time, place, and manner restrictions regarding any other type of conduct during noninstructional times, and such policy is enforced consistently, regardless of the content of the conduct being proscribed.*"

The court finds that the words underlined above may not be sufficiently narrowly tailored, and thus finds that the Motion To Stay as to these twelve words of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction is due to be granted. *In staying the word "quietly," and the phrase "so long as it does not unduly call attention thereto and," however, the court notes that it is* ***merely clarifying what students have always been allowed to do consistent with the Permanent Injunction and established First Amendment law: engage in religious activity that is not officially sanctioned or coerced and that does not infringe on the rights of others.*** *See Tinker*, 393 U.S. at 513.

The Parties are put on notice, however, that inconsistent

and (6) student distribution of religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials.[27] Not only a reasonable, but a literal reading of the terms of section 6(a) shows a clear delineation between "*school organized* or *officially sanctioned* religious activity," (Permanent Inj. at 3), and non-school organized, non-officially sanctioned

---

enforcement of school rules that work to favor religious conduct over other types of conduct may be construed as state promotion or indorsement of religion or a particular religion over other religions or non-religion. The First Amendment requires the government to remain strictly neutral among religions and between religion and non-religion. *Jager,* 862 F.2d at 828. Further, as the *Tinker* court noted: **"[C]onduct by the student, in class or out of class, which for any reason--whether it stems from time, place or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."** *Tinker,* 393 U.S. at 513 (emphasis added).

[27] Here, the Permanent Injunction refers readers to section 6(e), where the court requires DeKalb County to promulgate "a written policy of general application for all DeKalb County public schools ... to govern such distributions in terms of time, place, and manner restrictions." (Permanent Inj. at 9.) In 6(e), the court reemphasizes that the Permanent Injunction "DOES NOT prohibit student distribution of religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distribution of nonreligious materials." (Permanent Inj. at 10.)

student conduct.

Nevertheless, the Attorney General contends that under his reading of section 6(a), the following could be prohibited:

(1) Discussions in a history class dealing with the contributions of historical figures to modern day society. (Defs.' Mem. In Supp. at 5.)

(2) Discussions of the meaning or origin of certain state-recognized holidays. (*Id.* at 1, 6.)

(3) Bible reading and discussion among students in a study hall or homeroom period, even if not disruptive of the classroom setting. (*Id.;* Defs.' Reply at 11.)

(4) Student-initiated Bible Club meetings on campus after school hours. (*Id.* at 7.)

(5) Students praying before lunch. (Defs.' Reply at 12.)

(6) A student giving a flyer to another student about an event at his church or youth group.

2. *Section 6(b)*

In its entirety, section 6(b) of the court's Permanent Injunction reads as follows:

> (b) *Regarding Graduation or Commencement Exercises.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing,

ordering, procuring, participating in, or permitting, prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises, regardless of whether such prayer, invocation, benediction, or devotional message is offered by clergy, a student, administrator, teacher, school employee, or nonschool person, regardless of how such prayer, invocation, benediction, or devotional message is denominated, and regardless of whether a public-address system is used. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED from permitting such activity at commencement or graduation exercises in the guise of valedictory, salutatory, historian, or similar student addresses and remarks.

This PERMANENT INJUNCTION DOES NOT proscribe a brief personal expression by a student which contains religious references during a commencement exercise or student address (for example, a student may express thanks to Deity for his or her academic success),[35] [sic] provided

---

[35] This is but one example of a brief permissible reference by a student to Deity or religion. This example is not meant by the court

that such expression is not encouraged in any way by school officials and does not invite audience participation or response (for example, a student speaker may not invite the audience to participate with him or her in prayer or urge the audience to take a moment with him or her to thank Deity). Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of the violative conduct as it occurs and to deter similar conduct in the future.

The Defendants, and each of them, are further PERMANENTLY ENJOINED from listing, announcing, or memorializing any religious activity or message on any commencement program at any DeKalb County school. The Defendants, and each of them, are specifically

---

to suggest any form of expression to any student or to suggest that this is the only such reference that would be permissible. It is intended to be illustrative only, and to assist school officials in complying with the terms of this PERMANENT INJUNCTION. (Permanent Injunction at 5 n. 1.)

> PERMANENTLY ENJOINED from printing baccalaureate announcements or commemorations or other materials regarding baccalaureate services on the commencement programs of DeKalb County public schools and from organizing or sponsoring any baccalaureate event (although they may attend). School officials are prohibited from encouraging or discouraging, directly, or indirectly, a student's attendance at baccalaureate services. Specifically, school officials may not condition a student's attendance at commencement exercises on attendance at baccalaureate events.

(*See* Permanent Inj. at 4-6 (emphasis in original).)

Prohibited under section 6(b) are:

(1) Prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises.

(2) Such activity in the guise of valedictory, salutatory, historian, or similar student addresses and remarks.

(3) The listing, announcing, or memorializing of any religious activity or message on any commencement program at any DeKalb County school.

(4) The printing of baccalaureate announcements or commemorations or other materials regarding baccalaureate services on the commencement programs of DeKalb County public schools.

(5) The organization or sponsorship of any baccalaureate event by school officials.

(6) School officials encouraging or discouraging, directly or indirectly, a student's attendance at baccalaureate services.

(7) School officials conditioning a student's attendance at commencement exercises on attendance at baccalaureate events.

Prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises are prohibited regardless of whether offered by clergy, a student, administrator, teacher, school employee, or nonschool person, regardless of how denominated, and regardless of whether a public-address system is used. When violations occur, school officials are directed to take "appropriate disciplinary action as they would for any violation of school disciplinary rules." (Permanent Inj. at 6.)

Again, the court took pains to note what section 6(b) does not proscribe:

(1) A brief personal expression by a student which contains religious references during a commencement exercise or a student address that is not encouraged by school officials and that does not invite audience

participation or response.[36]

The Attorney General contends that section 6(b) is vague, (Defs.' Mem. In Supp. at 9; Defs.' Reply at 12), and under his reading of section 6(b), a student valedictorian could be prohibited from explaining why Mother Teresa was an inspiration for his or her success. (Defs.' Reply at 12.) The Attorney General also contends that when he reads section 6(b) literally, it: (1) could require the school to "police all in attendance" (Defs.' Mem. In Supp. at 9); (2) discriminates against private religious speech based on its content and viewpoint (*Id.* at 9-11); (3) would lead to school officials censoring a student graduation speaker's thoughts before a speech was given (Defs.' Mem. In Supp. at 2); (4) violates the Establishment Clause by requiring state entanglement with religion (*Id.* at 11-12); and (5) violates Supreme Court and

---

[36] The court specifically noted that a student may express thanks to Deity for academic success and emphasized that the court was not suggesting that this was the only such reference that would be permissible. The court's example was meant to be "illustrative only," and articulated to "assist school officials in complying with the terms of this PERMANENT INJUNCTION." (Permanent Inj. at 5 n. 1 (emphasis in original).)

The court also explained that the permissible "personal expression by a student ... may not invite the audience to participate with him or her in prayer or urge the audience to take a moment with him or her to thank Deity." (Permanent Inj. at 5-6.)

Eleventh Circuit precedent. (*Id.* at 12-14.)

3. *Section 6(c)*

In its entirety, section 6(c) of the court's Permanent Injunction reads as follows:

> (c) *Regarding Use of Public-Address Systems for Religious Addresses.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting commanding, counseling, inducing, ordering, procuring, participating in, or permitting, students, school employees, school officials, clergy, and nonschool persons to pray or to deliver religious or devotional messages (including scriptural readings) over any public-address system during the instructional day (including the home room period) or in connection with any school-sponsored event, including, but not limited to, assemblies and sporting events. This provision includes the delivery of daily announcements. No exception to this provision shall be permitted during times of perceived crisis or exigent circumstances. Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school

> disciplinary rules, said disciplinary action being calculated to cause the cessation of such violative conduct as it occurs and to deter similar conduct in the future.
>
> This PERMANENT INJUNCTION DOES NOT prohibit students from making announcements over the school public-address system regarding meetings of noncurricular religious clubs, provided that the announcements themselves do not contain a prayer or devotional, and provided that any such announcements are subject to the same time, place, and manner restrictions that apply to announcements of nonreligious activities.

(Permanent Inj. at 6-7 (emphasis in original).)

Activity prohibited under section 6(c) includes:

(1) The delivery of prayers, religious or devotional messages (including scriptural readings) over any public-address system during the instructional day, including: the home room period, the delivery of daily announcements, and in connection with any school-sponsored events.

When violations by students occur, school officials are directed to "take appropriate disciplinary action as they would for any violation of school disciplinary rules." (Permanent Inj. at 7.) The court specifically noted that

students could make announcements over a school public-address system "regarding meetings of noncurricular religious clubs, provided that the announcements themselves do not contain a prayer or devotional, and provided that any such announcements are subject to the same time, place, and manner restrictions that apply to announcements of nonreligious activities." (Permanent Inj. at 7.)

The Attorney General contends that 6(c)'s restrictions regarding the use of school public address systems for religious addresses are unconstitutional because they are vague and overbroad. (Defs.' Mem. In Supp. at 14-15.) Under his reading of this provision: (1) "Muhammad Ali would not be able to address the student body and share his life's [sic] story;" and (2) "school officials would be required to censor all student speeches which occur as part of any school assembly." (Defs.' Mem. In Supp. at 2.)

4. *Section 6(d)*

In its entirety, section 6(d) of the court's Permanent Injunction reads as follows:

> (d) *Regarding School-Sponsored Assemblies and Events.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise participating in,

or permitting, prayers, Biblical and scriptural readings, and other presentations or activities of a religious nature, at all *school-sponsored or school-initiated* assemblies and events (including, but not limited to, sporting events), regardless of whether the activity takes place during instructional time, regardless of whether attendance is compulsory or noncompulsory, and regardless of whether the speaker/presenter is a student, school official, or nonschool person.

This PERMANENT INJUNCTION DOES NOT prevent secondary-school students from engaging in religious expression and activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071 *et seq.*, which, while according students expressive rights, does not allow school officials to provide special privileges to noncurricular student religious clubs in terms of meetings and assemblies that they do not provide to other student clubs.

(Permanent Inj. at 7-8 (emphasis in original).)

Section 6(d) prohibits:

(1) Prayers, Biblical and scriptural readings, and other

presentations or activities of a religious nature, at all *school-sponsored* or *school-initiated* assemblies and events, regardless of whether the activity takes place during instructional time, whether attendance is compulsory or noncompulsory, and regardless of the speaker.

The court noted that the Permanent Injunction did not interfere with the Equal Access Act, and specifically noted that the Act accords students expressive rights but "does not allow officials to provide special privileges to noncurricular student religious clubs in terms of meetings and assemblies that they do not provide to other student clubs." (Permanent Inj. at 8.)

Section 6(d) is challenged because the Attorney General reads its provisions to be "grossly overbroad" and "literally would prevent: (1) a parent from praying silently in the stands at a football game" (Defs.' Reply at 13); (2) "a group of football players gathering together before a school game to pray" (Defs.' Mem. In Supp. at 15-16); (3) "a football player who scores a touchdown during a game from kneeling down in the endzone to pray" (*Id.* at 16); and (4) the singing of "Silent Night" and other songs at a school Christmas play or concert. (*Id.*)[37]

---

[37] After a detailed search of the Permanent Injunction, the March 1997 Memorandum Opinion and Order, the November 1997

5. *Section 6(e)*

In its entirety, section 6(e) of the court's Permanent Injunction reads as follows:

> (e) *Regarding Distribution of Bibles and Other Religious Tracts.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise permitting, school officials or nonschool persons to enter any classroom or any school property where students are assembled, for the purpose of distributing Gideon Bibles or other religious tracts, literature, or paraphernalia to students on

---

Memorandum Opinion and Order, and the November 1997 Supplemental Opinion and Order, the court can find no reference to a ban on the singing of "Silent Night" or other songs at a school Christmas play or concert. *Any* school sponsored or officially sanctioned activity must simply comport with standing Supreme Court and Eleventh Circuit law, as well as the terms of the court's Permanent Injunction. Clearly read, section 6(d) prohibits such activities that are *primarily* of a "religious nature." As section 6(a) notes, the expression of religious material in an objective, academically appropriate manner is clearly permissible. And, as section 6(c) notes, "religious or devotional" messages may not be delivered over a public address system during the instructional day. Section 6(d) merely proscribes the delivery of such *officially sanctioned, content-focused messages in school-sponsored assemblies and events.*

school property during the school day, including the home room period and any period during which students are required to be present in school, or at any school-sponsored event.

No distribution of Gideon Bibles or other religious tracts, literature, or paraphernalia by placement of them in a common area shall occur in the absence of a formal, written policy adopted by the DeKalb County Board of Education governing distribution of materials from nonschool persons in DeKalb County public schools generally.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED that within thirty (30) days of the date of this PERMANENT INJUNCTION, Defendants shall promulgate a written policy of general application for all DeKalb County public schools, binding upon all school principals, teachers, and other school employees uniformly in each public school in DeKalb County, to govern such distributions in terms of time, place, and manner restrictions; and Defendants shall serve a copy of the same upon Plaintiffs' counsel, who, within ten (10) days, shall

list any objections, and shall submit the same to this court for its rejection or concurrence. Following court approval, the Defendants shall publish and shall distribute to each school principal a copy of the written policy, with instructions that it shall be followed in each DeKalb County public school.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to provide *immediately* to the Gideons International representatives who are known by them to have visited DeKalb County schools, or to their designated organizational representative, a copy of this PERMANENT INJUNCTION.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to inform the organization in writing, *immediately,* that students shall not be harassed with regard to acceptance or nonacceptance of any Gideon Bibles that may occur while its representatives are situated on public property near the school, (such as the public sidewalk), if students who are approached for distribution are still situated on or boarding

school property, and that they shall not throw or pass Gideon Bibles through the windows or doors of DeKalb County school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property (for example, standing in line in the school parking lot to board the bus and still under school officials' general supervision and protection, or boarding the public school bus).

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to send a copy of this written notification to Plaintiffs' counsel and to file a copy with the court.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to follow the exact steps enumerated herein for any nonschool group or person other than the Gideons International that wishes to have access to students for the purpose of distributing Bibles, religious tracts, religious literature, or religious paraphernalia.

> In the event of a violation of this PERMANENT INJUNCTION, and in the event of aggressive or harassing behavior of the sort proscribed herein, school officials shall take action to cause the violative conduct to cease immediately.
>
> This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials.

(Permanent Inj. at 8-11 (emphasis in original).)

The Attorney General challenges section 6(e), contending that it "violates the Gideon's right to distribute religious literature in a traditional public forum without a compelling state interest." (Defs.' Mem. in Supp. at 17; *see also* Defs.' Reply at 16-21.) Plaintiffs contend that the Attorney General does not have standing "to challenge the alleged chilling of the Gideons' alleged free-speech rights." (Pls.' Opp'n at 30.) This, Plaintiffs argue, "is the Gideons' burden." (*Id.*) The Attorney General counters that he does have standing because: (1) "the Attorney General has both a legal right and an obligation to defend the constitutional rights of the citizens of Alabama" (Defs.'

Reply at 14); (2) "the Attorney General has sworn, under oath, to abide by the laws of the State of Alabama and the United States, and at all times to secure their enforcement" (*Id.* at 15); (3) as "a named party to this lawsuit ... the Attorney General has every right to raise vagueness/overbreadth issues which arise in the course of this litigation" (*Id.*); and (4) the Attorney General represents the State and DeKalb County Boards of Education, the Permanent Injunction requires these Parties to take steps which the Attorney General contends "will chill the free speech rights of a party," and "[c]onsequently, the Attorney General has standing, on behalf of his clients, and himself individually, to raise the Gideon's free speech rights." (*Id.*)

Although the court has doubts regarding the Attorney General's ability to speak for the Gideons, *see Lucero,* 121 F.3d at 605 n. 25 (quoting *Madsen,* 512 U.S. at 775-77 ("[Defendants] themselves are named parties in the order, and they therefore lack standing to challenge a portion of the order applying to persons who are not parties")), regardless of the standing issue, a reasonable and literal reading clearly shows that section 6(e) merely prohibits:

(1) School officials or nonschool persons from entering any school property where students are assembled, for the purpose of distributing Gideon Bibles or other

religious tracts, literature, or paraphernalia to students *on school property during the school day* or at any *school sponsored* event.

(2) The distribution of Gideon Bibles, religious tracts, literature, or paraphernalia by placement in a common area *absent* a "formal, written policy ... governing distribution of materials from nonschool persons in DeKalb County public schools generally." (Permanent Inj. at 8-9 (emphasis added).)

As noted above, section 6(e) specifically emphasizes that the Permanent Injunction "DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials." (Permanent Inj. at 11 (emphasis in original).) In its November 1997 Supplemental Opinion and Order, the court also stated that:

> The court does not wish by the terms of its injunction to discriminate against the Gideons International. The court does not intend by its injunction to single out the Gideons for discriminatory treatment or to infringe upon their free-speech rights. By the same token, the court is disturbed by the absence of uniform regulation by school officials and the 'gap' this leaves in the

> delicate area of the interplay between the rights of nonschool persons and students. It is for this reason that the court's injunction makes reference to the location of students. The court takes it as a simple truism that, where the public schools are concerned, adult nonschool persons cannot harass or act aggressively toward students in regard to distributing *any* materials, religious or otherwise. Such conduct would not be reasonable in time, place and *manner*.

(November 1997 Supp. Op. and Order at 51-52.)

Section 6(e) also requires the following:

(1) A promulgated, written policy applicable in all DeKalb County public schools governing distributions in terms of time, place, and manner restrictions.

(2) Publication and distribution of a written copy of such policy with instructions that it shall be followed to each school principal, with instructions that it shall be followed in each DeKalb County public school.

(3) That a copy of the Permanent Injunction be provided to the Gideons.

(4) That the Gideons be informed in writing "that students shall not be harassed with regard to acceptance or nonacceptance of any Gideon Bibles that may occur while its representatives are situated on public property near the

school ... *if* students who are approached for distribution are still situated on or boarding school property...." (Permanent Inj. at 10 (emphasis in original).)

(5) That the Gideons be informed additionally, that "they shall not throw or pass Gideon Bibles through the windows or doors of DeKalb County school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property...." (Permanent Inj. at 10.)[38]

(6) That the same steps be followed "for any nonschool group or person other than the Gideons International that wishes to have access to students for the purpose of distributing Bibles, religious tracts, religious literature, or religious paraphernalia." (*Id.*)

(7) That school officials "take action to cause ... violative conduct to cease immediately" in the event of violations of the injunction and in the event of "aggressive or harassing behavior of the sort proscribed herein." (*Id.*)

Regardless of the standing issue, on November 18, 1997, the Superintendent of Education for the DeKalb

---

[38]The court specifically noted that "still situated on school property" meant, for example, while students were ... "standing in line in the school parking lot to board the bus and still under school officials' general supervision and protection, or boarding the public school bus." (Permanent Inj. at 10.)

County Board of Education provided to the court a copy of a November 4, 1997 correspondence sent to the Gideons International. The Superintendent informed the court that, in addition to sending such correspondence to the Gideons International, he had met with local leaders of the Gideons International "to present the injunction and answer questions." (November 18, 1997 Correspondence from Superintendent of Educ. to the court, Attachment A.)[39] On November 25, 1997, Plaintiffs filed a pleading indicating the DeKalb County Board of Education's compliance with section 6(e). The substance of the correspondence from the DeKalb County Board of Education to the Gideons International reads as follows:

> Please find attached to this letter a copy of a permanent injunction issued by Judge Ira DeMent of the United States District Court for the Middle District of Alabama, Northern Division.
>
> Judge DeMent has ordered that you be provided with a copy of this injunction and that you be informed that students shall not be harassed with regard to acceptance or nonacceptance of any Gideon Bibles while Gideon representatives are

---

[39] This information was also reported in the DeKalb School Board's December 4, 1997 Report To Court.

> situated on public property near the school, and that Gideons shall not throw or pass Gideon Bibles through the windows or doors of school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property.

(*See* November 4, 1997 Correspondence from DeKalb County Bd. of Educ. Superintendent of Educ. to the Gideons International, Pls.' Notice of Compliance, Ex. A.)

Further, on December 2, 1997, Plaintiffs filed their "Notice Of No Objection To DeKalb County Board Of Education's Policy Regarding Distribution Of Materials By Nonschool Persons." ("Pls.' Notice of No Objection"). Plaintiffs state that "they have confirmed in a conversation with DeKalb County counsel that the policy proposed ... as to distribution of nonschool materials was in fact adopted by the DeKalb County Board of Education last week." The policy reads as follows:

> **Distribution of Literature: Student Rights and Protection**
>
> The DeKalb County School Board of Education recognizes the right of students to distribute literature on public school property, subject to reasonable time, place and manner restrictions

> imposed by the school. Such restrictions should be reasonable and must apply evenly to all nonschool student distributed literature.
>
> DeKalb County schools may prohibit the distribution of literature that is obscene, defamatory, or disruptive of the educational environment.
>
> The DeKalb County Board of Education prohibits the distribution by DeKalb County school board employees and nonschool individuals of commercial, political, religious or promotional materials to students on public school property.

(Pls.' Notice of No Objection, Ex. A, proposed policy for literature distribution.)

Clearly, the DeKalb County Board of Education understood its obligations under section 6(e) of the Permanent Injunction. Not only did DeKalb County comply with those provisions addressing the Gideons International, it also complied with those provisions requiring the promulgation of a written policy governing the distribution of materials in DeKalb County schools. In correspondence dated November 25, 1997, the Superintendent of Education for DeKalb County stated that "[o]n Page 9 of the Permanent Injunction, provisions are made for a review and the listing of any objection within

ten days. I will wait for Court approval, and possible revision, before officially implementing this policy in DeKalb County Schools." (*Id.*) Based on the foregoing, the court finds that, without addressing the propriety of section 6(e), the substantive provisions therein have been substantially complied with, and any objections relating thereto are accordingly moot.

6. *Section 7*

In essence, section 7 of the Permanent Injunction requires the following:

(1) The distribution of the court's opinions and Permanent Injunction to school principals in DeKalb County with instructions that each principal inform faculty, staff and students that the court requires compliance. (Permanent Inj. at 12.)

(2) That in each DeKalb County public school, a copy of the Permanent Injunction be made available or posted in areas commonly utilized for communicating notices or information to both students and faculty until the Permanent Injunction expires. (*Id.*)

(3) That a copy of "The Riley Letter" and a copy of the monograph entitled "Religion in the Public Schools: A Joint Statement of Current Law" remain available in each DeKalb County public school library until expiration of the Permanent Injunction. (*Id.*)

(4) That copies of the court's opinions and Permanent Injunction, together with a notice specifically articulated in the Permanent Injunction, be provided to groups organized for parental participation in school affairs at each DeKalb County public school. (*Id.* at 12-13.)

(5) That during the 1997-98 school year, Defendants conduct an in-service training session for faculty and administrators in DeKalb County public schools that is "reasonably designed to familiarize these school officials with the provisions of this Permanent Injunction, the general contours of Establishment Clause and Free Exercise principles as the court has explained them in its opinions in this case, their rights and duties in connection with the controlling law of church and state relations in the public-school setting, and the general issue of school officials' tolerance for diversity in religious opinion and duty of neutrality in matters of religion when acting in their official capacities." (*Id.* at 13.)

(6) That Defendants direct all new faculty and administrators not present for the 1997-98 in-service training to acknowledge in writing that they have read the curricular/teaching materials used at the 1997-98 in-service session. (*Id.*)

(7) That the curricular material used for the in-service be the court's opinions in this matter, together with a

"program of religiously neutral, nonsectarian content selected by the DeKalb County School Board and submitted to the court-appointed monitor [for approval], with a copy served on Plaintiffs' counsel for the purpose of tendering specific written objections...." (*Id.* at 13-14.)

(8) That counsel for the School Board certify to the court on pre-determined dates each year, "that each school within the DeKalb County school system is in compliance with this Permanent Injunction." (*Id.* at 14.)

(9) That in conjunction with Plaintiffs' counsel, a monitor be nominated for the purpose of insuring compliance with the Permanent Injunction. (*Id.* at 15-16.)

(10) That the in-service session and monitor be paid for by the DeKalb County Board of Education. (*Id.* at 16.)

These enforcement provisions are challenged "[t]o the extent that section 7 requires school officials to enforce certain provisions of section 6." (Defs.' Mem. in Supp. at 22.) Section 7(e) is specifically challenged as vague because, according to the Attorney General, directing school officials to use a "program of religiously neutral, nonsectarian content," is not sufficiently clear. (*Id.*) Nevertheless, contrary to the Attorney General's purported failure to understand the requirements of section 7, the DeKalb County Board of Education and its members have made it patently clear that they understand the Permanent

Injunction's requirements.

In addition to the Report to the court, (examined *supra*), on December 2, 1997, Plaintiffs filed a pleading entitled "Notice Of Agreement With DeKalb County Board Of Education's Nominee As Monitor, Notice Of Agreement With DeKalb County Board Of Education's Selection Of Course Materials, And Notice Of No Objection To DeKalb County Board Of Education's Policy Regarding Distribution Of Materials By Nonschool Persons." These pleadings illustrate to the court the DeKalb School Board's ability to understand the terms of the Permanent Injunction. *The court finds the Attorney General's assertion that the School Board does not understand its obligations under the Permanent Injunction curious, especially in light of the DeKalb School Board's filings.* The Attorney General would be well advised to communicate more fully with his purported client(s) before making assertions on its behalf.

7. Refutation of the Attorney General's Hypotheticals

The Attorney General's selective interpretation of the words and phrases in the challenged provisions of the court's Permanent Injunction is a prime example of what Plaintiffs contend to be the injection of "political divisiveness into these proceedings," (Pls.' Opp'n at 4 n. 8), and one of the "spectres intended to induce fear and

horror" into the populace. (Pls.' Opp'n at 9.) The court has made patently clear in its Permanent Injunction, read reasonably and without "narrow literalism," and for that matter, in its other Orders, of which the Attorney General should have received copies, exactly what type of conduct is proscribed. The court has also taken pains to note what is permissible under current Supreme Court and Eleventh Circuit precedent. Although clear under a reasonable and logical reading, the Attorney General has adduced hypothetical situations as a means of challenging the Permanent Injunction. In their Opposition to Defendants' Motion To Stay, Plaintiffs responded factually, legally, and with specificity, to the Attorney General's hypotheticals. The court hereby adopts the pertinent provisions of Plaintiffs' pleading presented below:

> Only by ignoring the plain language of the injunction, the teachings of this Court's March 12 opinion, and the facts as presented by the parties and found by the Court can one reach such astounding conclusions. And, only by ignoring 30-odd years of precedent can one reach the conclusion that the Attorney General is likely to succeed on appeal. As this Court pointedly noted in its November 12, 1997 Supplemental Opinion and Order, "[t]his federal district court does not

judge it to be its province to adopt for Alabama" the case law of the Fifth Circuit, in the face of *Lee v. Weisman* and *Jager*, to name but two controlling cases. (*See* Supp. Op. at 42, Ex. A hereto.) Thus, the defendants' likelihood of success on appeal only exists if the Eleventh Circuit overrules *Jager*, a matter which this Court cannot prognosticate and which matter will shortly be in the hands of the only court that can preliminarily overrule or ignore it. *Jager* is now the law, and under *Jager*, the defendants have no substantial likelihood of prevailing on appeal.

...

1. Students *can* read their Bibles during study hall [40]

---

[40] There might indeed be a situation in which a student is prohibited from reading his or her Bible during study hall, but only if that activity is "school organized" or "officially sanctioned." An individual student reading his or her Bible in study hall, without direction to do so from the teacher or a school official, is not encompassed in the terms of the injunction. Nor, by the plain terms of the injunction, is a school official proscribed from instructing a student in, *e.g.*, a Bible as Literature class to do his or her homework, including assigned reading from the Bible. Finally, of course, the entire injunction must be read in context, not dissected to fit the Attorney General's purposes in one narrow phrase. Section 6(d) makes it clear that the Court does not contemplate enjoining the student sitting in study hall; it expressly refers to a "speaker/presenter." A "speaker/presenter" is not a student quietly reading the Bible in study hall, as common sense informs us.

The objection to the injunction as "vague" and "overbroad" purports to find that under these amorphous provisions, a student cannot read the Bible in study hall. As the Court was at pains to make clear in its March 1997 Memorandum Opinion, a copy of which was attached to the injunction, the Establishment Clause does not reach private student expression and activity. In its injunction, the Court similarly made it clear that only "school organized" or "officially sanctioned" religious activity falls within the scope of its prohibition.[41] What is "school organized" or "officially sanctioned" religious activity? According to the Court:

[W]hen a student advocates his or her religious beliefs in situations where the student's peers are unable to move about freely (and thereby avoid listening to speech they find disagreeable) and/or when the student's peers are unable to freely express themselves in response (because school officials are actively controlling a particular

---

[41] In fact, the Court e ven emphasized, through the use of italics, that the phrase "religious activity" is to be modified by the phrases "school organized" and "officially sanctioned." (Injunction at 3.)

setting).[42]

The Court would distinguish the above-described situations from those periods during which students are "in school" or attending a school-event but school officials exercise minimal supervisory control and students are free to move about as they please. During these latter times, *e.g.*, in between classes or lunch (depending on the factual circumstances) the restrictions on students' free speech rights are limited; students should be able to engage in sectarian, proselytizing, religious speech as long as it is not, for reasons other than its content, disruptive (*e.g.*, it is loud, the speaker is aggressive etc.).

And, the Court clarified, "As long as students abide by a school's generally applicable rules and regulations, students should ordinarily" be permitted to engage in a wide variety of religious expression. The Court went on to provide an "exemplary" list only, one that was "by no means intended to be a complete statement of permssible [sic] religious expression by public school

---

[33] Self-evidently, a student privately reading a Bible in study hall does not necessitate a "response" from anyone.

students." (Mem. Op. at 22-23 & nn. 16, 17.) When the speaking student's use of the school's facilities includes commandeering a captive audience or a school setting in which the speaker's schoolmates are unable to respond in kind, speech is "officially sanctioned" because the speaker is then using the machinery of the state for conveying the religious message to the captive audience. Thus, a student who obtains the permission of the school official who is monitoring the study hall and then leads his fellow study hall participants in a public Bible reading and prayer from which the dissenting students could not leave is on different constitutional ground than a student who whiles away the hour by silently reading Proverbs, instead of *Sassy* magazine, after completing his or her math assignment. The latter is engaging in that type of private religious activity which falls outside the reach of the Establishment Clause, while the former is not. The latter's conduct is not touched by the injunction, while the former's is prohibited. This portion of the injunction is in keeping with the requirements of the First Amendment. Public school officials are prohibited by the

Establishment Clause of the First Amendment to the United States Constitution from authorizing *anyone* --including students--to insert religious exercises into a *school* program. *Lee v. Weisman,* 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992); *Abington School District v. Schempp,* 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); *Jager v. Douglas County Board of Education,* 862 F.2d 824 (11th Cir.), *cert. denied,* 490 U.S. 1090, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (1989); *Karen B. v. Treen,* 653 F.2d 897 (5th Cir.1981), *aff'd per curiam,* 455 U.S. 913, 102 S. Ct. 1267, 71 L. Ed. 2d 455 (1982). This law is nothing new, and it militates against granting a stay.

2. Students *are* permitted to discuss the meaning of Christmas and Easter

As already noted, the Court's order reaches only "school organized" or "school sponsored" religious activity, so a student's discussions with his or her friends over lunch or on the playground are not affected in any way by the injunction. As for in-classroom activity, the Court has made provision for those students who might wish to give a speech or presentation that includes their personal religious beliefs, including the meaning

of Christmas. In paragraph 6(a), the Court states: "This PERMANENT INJUNCTION DOES NOT proscribe students' voluntary expression of their own religious beliefs in the form of homework or artwork or other school assignments as applicable...." (Injunction at 4 (emphasis in original).) This certainly includes a discussion of "What Christmas means to me" or "The true meaning of Easter" offered in connection with a school assignment (such as an essay or a speech). A student may choose in such an academic context to proffer ideas expressive of his or her own religious beliefs, consistent with *Schempp* and with this Court's injunction.

Likewise, contrary to the Attorney General's hyperbolic fulminations, the injunction does not prohibit a history student's in-class remarks about "why Jesus contributed more than Einstein or Edison." (Mot. Partial Stay at 5.) Assuming that such a remark is an expression of religious belief,[43] such remarks clearly fall within the

---

[34] It might be or it might not be. It is certainly possible that a student could believe that Jesus Christ is an important historical figure without believing that he is the Son of God, and presumably a great many Jewish believers, Muslims, Buddhists and agnostics could believe this. It could be, for example, that a Muslim student

above-articulated exception--the "voluntary expression of [students'] own religious beliefs in the form of ... school assignments." (Injunction at 4.)[44] If a teacher directs students to discuss the importance of various historical figures, a student's voluntary discussion of the importance of Jesus fulfills the terms of the assignment. This does not violate the terms of the injunction, does not violate the Constitution, and is not a reason to grant the motion to stay.

---

or even an atheist student could believe that Jesus was a great teacher without believing in or expressing a belief in Jesus' divinity. It could be that a person of any religion or no religion could forcibly argue in the context of an academic assignment that measuring a calendar from the date of a crucifixion is *prima facie* evidence that the historical importance of Jesus outweighs that of the inventor of incandescent lighting. This speech would not necessarily be religious, and even if it were, it is not proscribed. The matter is neither here nor there, except to the extent it is in the Attorney General's head and his brief.

[44] Also, to the extent that "educational texts" were involved in this hypothetical history class, those texts can be specifically religious, as long as the books or documents are part of an objective or academic course of study. (Injunction at 3.) *See Schempp*, 374 U.S. at 225 ("It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment.").

3. Students *can* pray before lunch

The injunction does not reach private expressions of a student's faith, such as saying grace before meals. One particular pre-lunch "religious" behavior is prohibited: the "religiously based" harassment of Plaintiff Jesse Chandler by his fellow students at Fyffe School. (Injunction at 11.) According to the uncontroverted testimony of Michael Chandler in this case:

Fyffe School students are led to lunch every day and cannot leave the campus for lunch; the school has a closed-campus policy. In approximately October 1996, Jesse[45] began experiencing harassment in the lunchroom. I am aware that the agreement signed by my lawyer and DeKalb's lawyers states that school officials will intercede to stop harassment based on religious belief. Virtually every day between October 1996 and April 1997, approximately 175 out of 200 students in the lunchroom stood up and prayed aloud when Jesse entered the lunchroom. On one or more occasions, a student would announce on Jesse's

---

[45] Jesse Chandler, the minor-child plaintiff and son of Michael Chandler.

arrival, 'One, two, three, pray.' I discussed this situation about two weeks after it started happening with principal Danny Ashley, who admitted to me that this was occurring in systematic fashion.

I also complained to Superintendent Parrish. Both Ashley and Parrish told me that lunch time was noninstructional and students could do whatever they want. I do not challenge the right of small groups of students or individual students to pray nondisruptively at lunchtime. However, a mass, audible prayer offered specifically because my son has entered the lunchroom is in my view harassment that school officials should intercede to stop, particularly in view of the captive-audience problem. DeKalb County agreed that its school officials would intercede to stop harassment based on religion and has not done so despite my requests and the requests of my counsel.

... I do not want my son harassed every day in this way and for school officials to shirk their duty to stop the harassment. The students' behavior has been organized and vindictive. In April, I told Jesse to take his lunch to my wife Barbara

Chandler's classroom and to eat his lunch there to escape the harassment. I did so around the time that Jesse told me that the students were going to offer a Bible reading at lunch because they had heard I was going to be on campus that day. Technically, what I told my son to do is a violation of school policy, because he is supposed to be in the lunchroom during the lunch period. However, I felt that I must do something to prevent his being further stigmatized based on this lawsuit.

(Supp. Op. and Order at 21-22.). The Defendants, including Defendant Weldon Parrish, and DeKalb County official Danny Ashley, did not submit contrary testimony.

Moreover, this Court specifically stated that students at lunchtime, depending on the factual circumstances, "should be able to engage in sectarian, proselytizing, religious speech as long as it is not, for reasons other than content, disruptive (e.g., it is loud, the speaker is aggressive, etc.)." (Mem. Op. at 22 n.16.) 175 students ganging up on Jesse Chandler, if this is in fact "sectarian, proselytizing, religious speech," is also disruptive and aggressive. This Court's

proscription of that specific conduct does not extend to banning a student's saying of grace generally.

4. Students *can* distribute flyers about "youth group" activities to their fellow students

As is made absolutely clear in the injunction, students are NOT prohibited from "distributing religious materials to classmates during noninstructional time, subject to the same time, place, and manner restrictions imposed on student distributions of nonreligious materials ..." (Inj. at 4, 11.) In keeping with the policy of neutrality, students' distributions of tracts or invitations to church events are treated exactly like the distributions of non-religious materials and are subject to the school's time, place and manner restrictions. The First Amendment does not require anything more. This false objection is not a reason to grant the Attorney General's motion to stay.

5. A valedictorian *is not* prohibited from explaining the importance of Mother Teresa to her success in school

In the hypothetical offered by the Attorney General, a class valedictorian could not explain

the importance to her of Mother Teresa in her speech to the graduating class. (Mot. Partial Stay at 2.) The Attorney General complains that such a speech might be deemed a "devotional" and that school officials would be obligated to censor her speech before she gave it in order to prevent an infraction of the terms of the injunction.

The Attorney General has made a profound analytical error. Just as he assumes that all discussion or reference to Jesus is necessarily religious or proselytizing speech, he assumes that any discussion of Mother Teresa, merely because she is a religious figure, would be religious or have the purpose or effect of proselytizing. It is possible that, just as Jewish believers, Muslims and agnostics could believe that Jesus has been a shaping force in history without believing that he is the Son of God, persons could believe that Mother Teresa was a great helper of the poor without subscribing to her religious faith or religious example. Thus, speech about Mother Teresa is not necessarily religious speech.

Such a speech as the Attorney General contemplates is not a "devotional." The court's injunction is not issued in a vacuum; it is issued

in the factual context of DeKalb County. In DeKalb County, devotionals were expressly delivered over the public-address system, as all of the affidavits from employees at the Plainview School establish. They included Bible reading and prayers, and the DeKalb County affiants testified that the messages over the intercom were of "a devotional character, ... but not religious" even while admitting that they included Bible readings and prayer. (*See* Mem. Op. and Order, Nov. 12, 1997, at 10-12 (granting summary judgment to plaintiffs against DeKalb County on nonfacial challenges).) The Court made plain that it took a devotional to be religious. (*Id.* at 11.) The Court's injunction clearly contemplates that a devotional may is [sic] religious: "vocal prayer; Bible and religious devotional or scriptural readings" are proscribed by Section 6(a); prayer and "religious or devotional messages (including scriptural readings)" over the public-address system are proscribed by section 6(c); "Biblical and scriptural readings" at school-sponsored assemblies and events except where consistent with the Equal Access Act, are proscribed by Section 6(d). The Attorney General

may not pry one nubbin from the Court's injunction and pretend that it stands alone, without the context of the rest of the injunction and the factual context in which the injunction was rendered.

From a 40-page opinion on the facial validity of the statute in March 1997, over 50 pages of findings of fact and conclusions of law on November 12, 1997, a 24-page summary judgment opinion on November 12, 1997 which the Court stated was to be read concurrently with the findings of fact[46] –DeKalb County ought to know what is proscribed. *It does not matter if the other defendants who are not specifically enjoined as to DeKalb County practices understand the injunction or not.* An entire valediction on Mother Teresa is not proscribed; a prayer is. It is unimportant that the Attorney General purports not to know what a devotional is; it matters only that DeKalb County, which is bound by the provisions of the injunction,[47] knows what a

---

[46] *See* Supp.Op. and Order, Nov. 12, 1997 n. 53.

[47] [Not adopted].

devotional is. In this case, devotionals have, by all the facts, consisted of prayer and Bible reading. Nowhere in the Complaint is Mother Teresa mentioned, nor have the DeKalb County defendants purported to offer testimony about Mother Teresa. Instead, as the Court noted in its November 12, 1997 summary judgment opinion, the DeKalb County defendants sought refuge as to their "devotionals" and "words of inspiration"--which by their own affidavits turn out to be Bible readings and prayer over the intercom--in the statute's protection, themselves denominating such devotionals "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (*See* Mem.Op., Nov. 12, 1997 at 10-11.)

Noting that the DeKalb County defendants had equated "words of inspiration" with "devotionals" in response to an interrogatory inquiring about a Bible reading at a D.A.R.E. assembly, and averring that the activity was alleged to be 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions' *by DeKalb County,* the Court expressly stated: "The court finds it reasonable to conclude that

mere 'words of inspiration' would not require the invocation of the Alabama school-prayer statute and that DeKalb conflated such a category of inspirational words into the category of devotions in hopes of thereby insulating them from scrutiny." *The specific invocation of the statute would not be necessary for secular 'words of inspiration'....* (Mem. Op., Nov. 12, 1997, at 11.) (Emphasis added.)

In other words, *secular words of inspiration--as distinct from prayers and Bible readings* --are not prohibited by anything in the Court's injunction or in its opinions. *Secular presentations, including presentations drawing upon the examples of adults who have led righteous lives, are absolutely permissible.*[48]

---

[39] A "devotional" camouflaged by an "inspirational" patina is clearly what the Court had in mind, *with reference to the facts in DeKalb County, which it exhaustively detailed,* when it referred in Section 6(a) to discussions of a devotional/inspirational nature in "the classroom and in instructional settings," as distinct from graduation. It did not repeat this phrase with regard to graduation prayer. Why? Because the facts before the Court did not disclose with regard to graduation prayer, as they did with regard to prayer and devotionals over the intercom system during the instructional day, that "words of inspiration" were actually Bible readings or prayers. Thus, the Court has no reason, in regard to graduation, to say anything other than what it implicitly said in its November 12, 1997 summary

Other federal courts agree with this court about what is proscribed activity, equating "devotional" with "prayer" and/or "Bible reading." *See Schempp,* 374 U.S. at 207 (student-chosen Bible readings followed by Lord's Prayer); *Wallace v. Jaffree,* at 42 (noting complaint's equivalence of "devotional" activities with "saying prayers in unison"); *Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n,* 766 F.2d 932, 937 (6th Cir.1985) ("devotional thought" is "something fresh to me from the Scriptures"); *EEOC v. Townley Engineering & Manufacturing Co.,* 859 F.2d 610, 612 (9th Cir.1988) (devotional services included "prayer, thanks to God, testimony and scripture reading"); *Bell v. Little Axe Sch. Dist.,* 766 F.2d 1391, 1397 n. 2 (10th Cir.1985) (devotional exercises also called "fellowship, prayer sessions, prayer meetings, religious sessions, religious meetings, 'sharing sessions,' and 'Prayer Service/Activity' "); *Doe v. Stegall,* 653 F.2d 180 (5th Cir. Unit A 1981) (devotional

---

judgment opinion: that secular words of inspiration are permissible in that context. At graduation, the evidence being what it was, DeKalb County is enjoined from offering devotional messages, not from offering any secular inspirational message.

activities were "poetry, Bible verses and prayers of a Protestant cast"); *Meltzer v. Board of Pub. Instr.*, 548 F.2d 559, 573 (5th Cir.1977) (en banc), *cert. denied,* 439 U.S. 1089, 99 S. Ct. 872, 59 L. Ed. 2d 56 (1979) (devotionals consisted of "prayer and Bible reading"); *Alabama Civil Liberties Union v. Wallace,* 331 F. Supp. 966, 969 (M.D. Ala.1971) (Judge Varner finding that Bible readings are devotionals), *aff'd per curiam,* 456 F.2d 1069 (5th Cir.1972); *Herdahl v. Pontotoc County School Dist.,* 933 F. Supp. 582, 585 (N.D.Miss.1996) (devotionals were short inspirational messages often including Bible reading, frequently followed by a prayer).

This case was not litigated in the dark for going on two years. The record in this case reveals what a devotional is, and in this case, devotionals look a lot like the unconstitutional activity in the above-cited cases, especially *Herdahl.* Devotionals are religious, not secular words of inspiration. DeKalb County can understand this.

The Attorney General apparently is confused by the Court's specific reference to using a "Historian's Address" as a ruse for graduation prayer--which the evidence in this case shows

occurred--and has appended a prayer in the guise of a class "Historian's Address" that actually occurred to his general speculation about references to history or historical figures that have not occurred. This is not a reasonable reading, and it disregards the record.

This is the mataphorical [sic] apples and oranges dumped out of the cart into reason's path, hoping to trip it. It is clear from the Court's injunction that offering speech about historical figures, including religious ones, is permissible, and it is not permissible to offer *prayer* in the guise of a "Historian Address," as Sylvania High School did in 1996 and 1997 while this lawsuit was pending, the 1997 prayer occurring after plaintiffs' counsel had expressed objection to DeKalb County counsel. It is to this pointed "Historian Address" experience, not to Mother Teresa, that a particular provision for this contingency is made in the Court's injunction.

In short, the issue is not, as the Attorney General argues, whether students have free speech rights to expound on the topic of their choice in a graduation speech. The issue is whether school officials have authorized someone--anyone,

student or not[49]--to insert religious exercises into the school's graduation program.

This Court, like other federal courts before it, apprehends a "devotional" to be susceptible of its common meaning.[50] Its findings of fact and summary judgment opinion bear this out:

[I]n Interrogatory Number 11, the Plaintiffs ask: "In paragraph 50 of the DeKalb defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that student-led devotionals have taken place at Plainview School.' Do the DeKalb defendants contend in this lawsuit that such prayers offered

---

[49] Including Muhammad Ali. (Mot. Partial Stay at 2.)

[50] *See Random House College Dictionary* (rev. ed.1982). A "devotion" is defined as: "1. profound dedication; consecration. 2. earnest attachment to any purpose, cause, etc. 3. an assignment or appropriation to any purpose, cause, etc. 4. *Theol.*, the ready will to serve God. 5. Often, *devotions*. *Eccles.* religious observance or worship; a form of prayer or worship for special use." A "devotional" is defined as: "1. characterized by devotion; used in devotions. 2. Often, *devotionals*. a short religious service, esp. as part of a meeting, convocation, or the like." Any commonsense reading of the injunction here, informed by the evidence in this case, will indicate exactly what is meant by "devotions" and "devotionals." We are not talking about setting aside land or materials or an earnest attachment to the school principal.

by student 'volunteers' are 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions'?" DeKalb responded, "Yes."

Since all of the parties, as well as the Court, appear to be of the opinion that a 'devotional' is a religious exercise, that falls within the category of 'prayer, invocations and/or benedictions,' and the Court finds that for the same reasons it has found that under established United States Supreme Court precedent that vocal prayers led by students in the classroom are unconstitutional, student-led 'devotionals' are similarly unconstitutional. (Supp. Op. at 58 & n. 52) (*citing Engel, Schempp,* and *Lee*).

6. School officials *are not* required to be censors or to be clairvoyant at commencement or at student assemblies and events

The injunction contemplates that there will be no prayer, benediction, invocation or devotional at commencement exercises. The injunction contemplates that no student will offer one. *See* Section 6(b). However, the injunction does not contemplate censorship by school officials; if it did, it would not call for school officials to take

appropriate disciplinary action as they would for any violation of school disciplinary rules that is calculated to cause cessation of the conduct *as it occurs* and deterrence of such conduct in the future.

The same is true of student assemblies and sporting events. The injunction contemplates that there will be no prayer, scriptural readings, or devotional messages over the public-address system during the school day or at school-sponsored assemblies or events. However, the injunction does not contemplate censorship or prior restraint by school officials; if it did, it would not call for school officials to take appropriate disciplinary action as they would for any violation of school disciplinary rules that is calculated to cause cessation of the conduct as it occurs and deterrence of such conduct in the future.

This argument is simply a shibboleth. It is clear what the Court meant to prohibit, and it is clear that school officials--who have sat through a great many prayers in DeKalb County classrooms, as well as at football games, assemblies, and commencement exercises--know prayer when they

see it.

7. A parent *can* pray for an injured player while the parent is seated in the stands

The Plaintiffs have looked in vain for a portion of the injunction that would prohibit such prayers, as the Attorney General alleges. It is difficult to see how a parent who prays while seated in the stands, whether out loud or silently, would ever fall within the category of prohibited "school organized" or "officially sanctioned" prayers over the public address system at sporting events. (Injunction at 6-7). [sic] It is also difficult to see how a school official could either prevent or permit a parent from praying in the stands and so run afoul of the injunction.

The Attorney General's similar ... claim that a student cannot bow his head in prayer after scoring the winning touchdown is likewise not the reading of a reasonable person. Although Section 6(d) does not expressly provide that he can, Section 6(c) is the provision that is applicable to prayer over the public-address system at high school football games. The Attorney General's hypothetical does not feature the football player seizing the public-address system and

commandeering the audience, which would be proscribed under Section 6(c).[51] These examples indicate the way in which the Attorney General has seized on one little snippet of the injunction in order to sound the alarm bell without reading particular provisions in context or with regard to the facts or the totality of circumstances.

8. Student Bible Clubs *can* meet on the same terms as other student clubs

According to the Attorney General, the injunction would prohibit a student-initiated Bible Club from meeting on campus, even after school hours, and would prohibit students from publicizing the times and locations of such meetings. (Mot. Part. Stay at 6-8.) only through a tortured reading of the injunction could one arrive at such a conclusion, and the law does not require courts or parties to twist themselves into knots trying to find an unconstitutional meaning in an otherwise plain directive.

The provision of the injunction which the Attorney General finds offensive reads:

This PERMANENT INJUNCTION DOES NOT

---

[51] [Not adopted].

affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. § 4071 *et seq.*, or to quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves. This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious material to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials.... (Inj. at 4.) Manifestly, the injunction "does not affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act." (Inj. at 4.) The religious activity permitted by the federal Equal Access Act--the use of school facilities by student-initiated noncurricular Bible clubs on the same basis as other noncurricular clubs--is expressly protected. *See Westside Comm. Schl. v. Mergens,* 496 U.S. 226, 110 S. Ct.

2356, 110 L. Ed. 2d 191 (1990). The injunction also allows "students" (and there is nothing in the injunction which excludes members of the Bible Club from the general category of "students") to distribute "religious materials" to their classmates, on the same terms that nonreligious materials are distributed. Later, the Court clarified the rights of student Bible club members to have access to the public address system to publicize their meetings:

> This PERMANENT INJUNCTION DOES NOT prohibit students from making announcements over the school public-address system regarding meetings of noncurricular religious clubs, ... provided that any such announcements are subject to the same time, place and manner restrictions that apply to announcement of nonreligious activities. (Injunction at 7.)

As acknowledged by the Attorney General, this is precisely what federal law requires. (*See* Mot. Partial Stay at 8 ("official recognition allows student clubs to be part of the student program and carries with it access to the school newspapers, bulletin boards, the public address system and the annual Club Fair") (*quoting Mergens*).) The combination of the two clauses should solve the

Attorney General's problem with the injunction and end disputes about the rights of Bible Club members. The plaintiffs do not see how the Court could have been less vague or more narrow.

Still, the Attorney General insists that the injunction is overbroad because it makes it clear that in addition to these other rights, students may also "quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves."[52] (Injunction at 4.) A reasonable person would not glean from the injunction that this additional right to pursue the religious activities of the student's choice during noninstructional times interferes with the student's separate, Equal Access Act-guaranteed right to participate in a religious club on the same basis as he might in nonreligious clubs.

(*See* Pls.' Opp'n at 10-32.)

II. Conclusion

---

[52] The Court used the word "or," to indicate another item in the list of protected student activities.

Based on the foregoing, the court finds that those enjoined understand their obligations and responsibilities under the Permanent Injunction. **It is also clear that contrary to the Attorney General's strained hypotheticals, the Permanent Injunction does nothing to limit individual exercise of personal religious beliefs. The court has answered most, if not all of the Attorney General's proffered hypotheticals *in favor of the activity the Attorney General claims is prohibited.* As articulated throughout this Order, the activities the Attorney General claims are prohibited, simply put, *are not.***

Those attempting good-faith compliance with the court's Orders need not fear contempt citations. However, the court expects compliance with its Permanent Injunction unless and until it is further clarified by the Eleventh Circuit Court of Appeals or the United States Supreme Court. Counsel, in particular, are directed to make every effort to explain to their clients, in building block fashion if necessary, the exact nature and scope of the Permanent Injunction, and to endeavor to quell misunderstandings or misrepresentations, whether genuine or feigned, the latter of which appear to be running rampant.[53]

---

[53] The court notes the December 8, 1997 issuance of a memorandum by the Attorney General and the State Superintendent of Education regarding "Permissible Activities in the light of *Chandler v. James.*"

The political posturing that has followed this case encourages divisiveness and apprehension, benefits neither the citizens nor the school-children of Alabama, and clouds the real issues raised by this suit: the coercive religious practices engaged in or allowed by state officials in DeKalb County. In conformance with long established precedent, which this court is bound to follow and which

---

The court commends any *good-faith* effort to "clear up any misunderstandings" and "provide assistance to public school administrators and teachers." (*See* December 8, 1997 Mem., Attach. C; *see also,* Pls.' Add. Evid.) This memorandum was issued in conjunction with the Attorney General's December 8, 1997 Press Release. (*See* AG December 8, 1997 Press Release, Attach. B; *see also,* Pls.' Add. Evid.) Both documents attempt to articulate guidelines regarding permissible and impermissible conduct. Because the question of the propriety of the Attorney General and Superintendent's guidelines is not before the court, the court will not examine the issued guidelines in light of any of its previous Orders at this time.

Interestingly, however, although the Attorney General purports to have derived these guidelines exclusively from "previous opinions issued by the U.S. Supreme Court and the Eleventh Circuit Court of Appeals, rather than the *Chandler* ruling in October by a U.S. District Court in Montgomery," (AG December 8, 1997 Press Release at 1; *see also* Pls.' Add. Evid.), the guidelines track this court's Permanent Injunction and March and November 1997 Orders, as well as the cases relied on by this court in issuing those Orders. It is indeed odd that the Attorney General now cites those cases for support when they were conveniently ignored prior to the court's March 1997 Memorandum Opinion and Order. Nevertheless, the court commends any truthful dissemination of information regarding the issue of religion in the public schools.

the Attorney General now appears to recognize as controlling, the Permanent Injunction simply proscribes state-established religion and endeavors to ensure the state's neutrality in matters of religion in the public schools. An informed understanding of the Permanent Injunction discloses nothing more.

ORDER

Based on the foregoing, it is CONSIDERED and ORDERED that Defendants' Motion For Partial Stay Of Permanent Injunction be and the same is hereby GRANTED IN PART and DENIED IN PART. Defendants' Motion is GRANTED as to the twelve words in section 6(a) of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction reading "quietly" and "so long as it does not unduly call attention thereto and."[54] (*See* Permanent Inj. at 4, lines 14-16.) Otherwise,

---

[54] Paragraph 5 of section 6(a) of the Permanent Injunction, with those portions stayed, should read:

> This PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071, *et seq.*, or to ... engage in religious activity during noninstructional times, *... so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its*

Defendants' Motion For Partial Stay Of Permanent Injunction is DENIED. All other provisions of the October 29, 1997 Permanent Injunction shall remain in full force and effect absent modification by the Eleventh Circuit Court of Appeals or the United States Supreme Court. The Parties are DIRECTED to fully comply with the terms of the Permanent Injunction, absent the portion of section 6(a) STAYED above, as applicable.

---

imposition upon themselves. This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place, and manner restrictions imposed on student distributions of nonreligious materials, subject to the provisions of paragraph 6(e) below.